Supreme Court, U. S.
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No. 80-32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD J. HYNNING,

Appellant,

v.

DuFIEF MORTGAGE, INC., *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is the Virginia statute authorizing subject matter jurisdiction over a "partnership matter", with no statutory requirement of a nexus between Virginia and the "partnership matter" of a non-resident partnership, unconstitutional under Section 1 of the 14th Amendment to the Constitution of the United States as an overreaching of state court jurisdiction?

2. If Virginia lacks the constitutional power under (1) above, did the courts below err, (a) in decreeing enforcement of a prior judgment predicated upon the said statute, and (b) in prolonging the abuse of power by silently rejecting the constitutional attack on the Virginia statute?

PARTIES

The appellant is Clifford J. Hynning, a resident of Virginia and a general partner of a non-resident limited partnership, the Caravel Office Building Co. The partnership was a party to the first action, in which judgment was rendered on a partnership promissory note, but is not a party to this action to enforce the judgment. The appellee is DuFief Mortgage, Inc. [formerly known as Bogley, Harting, Mahoney & Lebling, Inc.], a Maryland corporation, which was also the plaintiff in the suit on the partnership promissory note. Genevieve H. Leggett is the holder of the first trust on the personal residence of Clifford J. Hynning. United Virginia Bank-National is trustee under that deed of trust. Certain other parties, who appear in the Proof of Service, were initially served with process but have no interest in this proceeding.* 28 U.S.C. § 2403(b) may be applicable.

*Commonwealth Abstract Corporation, Trustee; Louis H. Bean; Rudd's Swimming Pool Supply Co., Inc. and Anne Crutcher.

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APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

Clifford J. Hynning, appellant (hereinafter called "partner"), appeals from the final judgment of the Supreme Court of the State of Virginia, entered on April 10, 1980, refusing his Petition for Appeal directed to a judgment of the Circuit Court of Arlington County which upheld the constitutionality of the Virginia statute on process against partnerships. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented as to the constitutionality of a Virginia statute.

OPINIONS BELOW

Citations to the Record will be designated "R" and citations to the Appendix to this Jurisdictional Statement will be designated "p. ..a". The Supreme Court of Virginia

rendered no opinion, but merely entered an unreported Order declining to hear the case by refusing the Petition for Appeal [p. 1a]. The unreported opinion of the Circuit Court of Arlington County appears at pp. 2a-6a.

JURISDICTION

This is a creditor's bill filed by a Maryland corporation in the Circuit Court of Arlington County to enforce an earlier judgment of that Court on a debt of a non-resident partnership by judicial sale of the Virginia personal residence of the partner. By opinion rendered March 27, 1979 1979 [pp. 2a-6a], the Circuit Court of Arlington County rejected the partner's contention that the Virginia statute was unconstitutional as in violation of the Due Process clause of Amendment 14 to the Constitution of the United States. The Supreme Court of Virginia denied the partner's Petition for Appeal on April 10, 1980 [p. 1a]. Notice of Appeal to this Court was filed on May 2, 1980 [p. 9a] in the Circuit Court of Arlington County, the Court then possessed of the Record. The jurisdiction of the Supreme Court to review these decisions by direct appeal is conferred by 28 U.S.C., Section 1257(2). This appeal is docketed in this Court within 90 days from the denial of the Petition for Writ of Error below. The following decisions support the proposition that the erroneous failure by a state court to pass on a constitutional objection to a state statute is equivalent to a finding that the statute is valid. *Largent* v. *Texas,* 318 U.S. 418; *Lawrence* v. *State Tax Commission,* 286 U.S. 276, 282-83.

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment 14th, United States Constitution, Section 1:

. . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 8-59.1, 1950 Code of Virginia[1]

How process served on copartners or partnerships. Process against, or notice to, a copartner or partnership may be served upon a partner and it shall be deemed service upon the partnership and upon each partner individually named in the action, provided the person served is not a plaintiff in the suit and provided that the matter in suit is a partnership matter.

The above statute and its successor[1] are alleged to be unconstitutional.

In addition, the following Virginia statutes are involved in this action: Section 50-15, 1950 Code of Virginia, as amended, and Sections 8.01-301, 8.01-306, 8.01-328 and 8.01-328.1, 1950 Code of Virginia, as amended, reprinted at pp. 37a-40a.

RAISING THE FEDERAL QUESTION

The Federal constitutional question was presented in writing to an Arlington, Virginia Commissioner in Chancery on July 31, 1978 [R. 38; 55]. The Commissioner made no ruling thereon, and on January 16, 1979, the partner filed exceptions to the Commissioner's Report, assigning as error the failure of the Commissioner to rule on the constitutional contention [R. 69]. By "Memorandum of Clifford

[1]Since institution of this action, Section 8.59.1 has been superceded by Section 8.01-304, which is unchanged with regard to the issue in question and reads:

How process served on copartner or partnership. Process against a copartner or partnership may be served upon a general partner and it shall be deemed service upon the partnership and upon each partner individually named in the action, provided the person served is not a plaintiff in the suit and provided the matter in suit is a partnership matter.

Provided further that process may be served upon a limited partner in any proceeding to enforce a limited partner's liability to the partnership.

Appendix B contains excerpts from statutes and rules of 25 other

J. Hynning in Support of Exceptions to the Commissioner's Report", filed January 26, 1979 [R.74], the Federal constitutional question was presented to the Circuit Court of Arlington County. In its opinion of March 27, 1979, that Court expressly recognized the partner's contention that the statute conferring subject matter jurisdiction violated due process,[2] but overruled the exceptions and affirmed the constitutionality of the Virginia statute by holding: (1) that the question of subject matter jurisdiction had been litigated in the prior action on the partnership note and the partner was precluded from raising it in this creditor's bill to enforce the judgment, and (2) that even if the question had not been so litigated, the "subject matter" of the prior suit was "the alleged debt owed by the Defendant [Hynning] to the Plaintiff", even though "[t]he basis of the Defendant's obligation was his relationship (partner) with the maker of the note." [p. 5a]. After posting a full supersedeas bond, extended to

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states explicitly applicable to suits against foreign limited partnerships.

[2]"The thrust of the argument in short paraphrase, is that the note upon which the judgment was based was a foreign partnership obligation having no relationship to Virginia; that the partnership conducted no business in Virginia; that it had no employees working in Virginia; that the only possible basis of jurisdiction in Virginia was the residence of Clifford J. Hynning. To assert jurisdiction under such circumstances, contends the Defendant, would violate the 'minimal contacts' concept and would also be violative of due process."

* * *

"A careful reading of the able arguments presented in the prior case indicates that while the issue of subject matter jurisdiction was not phrased in that precise term, the concepts asserted were identical and could not have escaped the attention of the appellate courts. The denial of the appeals in effect confirmed the trial court's determination that it had jurisdiction." [p. 5a]. The appeals were a Petition for Writ of Error which the Supreme Court of Virginia, in its discretion, refused, and a Petition for Writ of Certiorari.

cover this appeal, the partner then presented the Federal constitutional question by Assignments of Error to the Supreme Court of Virginia, in a Petition for Appeal filed July 19, 1979, and in oral argument, asking that the Court hear the appeal, held before a panel of three Justices on April 2, 1980. [p. 1a]

STATEMENT OF THE CASE

Factually, this case is very simple, although the proceedings have not been so. Acting on a complaint filed by a Maryland corporation, styled *Bogley, Harting, Mahoney & Lebling, Inc., a Maryland Corporation* v. *The Caravel Office Building Company, a District of Columbia Partnership,* et als [p. 13a],[3] the Circuit Court of Arlington County rendered a judgment against the District of Columbia limited partnership [hereinafter called the "non-resident partnership"] which had no contacts of any type with Virginia. The sole nexus with Virginia was that one of the general partners who conducted no partnership business in the state, had a personal residence therein. Judgment was entered jointly, not jointly and severally, against the non-resident partnership and one of the general partners. The personal judgment against the partner was predicated solely upon his joint liability as a general partner for the debt of the non-resident partnership. The creditor's bill which is the subject of this appeal seeks to enforce that judgment by sale of the partner's personal Virginia residence.

The prior action was a suit on a partnership promissory note [p. 16a], payable in Chevy Chase, Maryland, in which the sole maker was the non-resident partnership and

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[3]The prior case cited in the text was before this Court on a Petition for Writ of Certiorari (denied March 20, 1978) under the name *Caravel Office Building Company and Clifford J. Hynning* v. *Bogley, Harting, Mahoney & Lebling, Inc.*, Case No. 77-1044.

the payee was the Maryland corporation. The note recited that the loan was made in the District of Columbia, was executed and delivered in the District of Columbia, was secured by District of Columbia real estate and contained tained an express stipulation that it was to be governed by the laws of the District of Columbia. The note was signed by the two general partners, one a resident of Arlington, Virginia, and the other a resident of Baltimore, Maryland, Neither general partner endorsed or guaranteed the note. The following additional facts were established in that action, which were taken as given facts in this creditor's bill: (1) the non-resident partnership (a) conducted, as its sole business, the ownership and management of an office building in the District of Columbia and it had never conducted business of any other nature whatsoever; (b) had its only business office in the District of Columbia where the partnership records were kept; (c) had never conducted business of any nature in Virginia; and (2) the partner had his only business office in the District of Columbia, and had never conducted any partnership business of any nature in Virginia.

Process in the prior case was served upon the non-resident partnership pursuant to Section 8-59.1, 1950 Code of Virginia, as amended [p. 3, *supra*], by posting on the door of the partner's personal residence in Virginia.

In the prior case, the Arlington Court overruled a "Motion to Quash Service on Caravel Office Building Company, a District of Columbia partnership", and a "Plea in Abatement or, in the alternative, a Motion to Dismiss"[4]

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[4]In connection with these motions, the partner represented in writing to the Arlington Circuit Court that all named defendants would agree to accept service of process in the District of Columbia and have the matter fully adjudicated by the U.S. District Court for the District of Columbia [p. 28a].

[pp. 26a-29a]. It was based upon these pleadings, the Petition for Appeal to the Supreme Court of Virginia and the Petition for Writ of Certiorari, that the Arlington Court ruled in this creditor's bill that the constitutional question here presented had been previously litigated and that the partner was precluded from raising the issue that the judgment was void for lack of subject matter jurisdiction.

THE QUESTIONS ARE SUBSTANTIAL

Succinctly stated, the questions presented by this appeal are whether a non-resident partnership is entitled to the same due process standard guaranteed to foreign corporations and foreign unincorporated associations with respect to minimal contacts with the subject matter of litigation.

I. THE VIRGINIA STATUTE AUTHORIZING SUBJECT MATTER JURISDICTION OVER A "PARTNERSHIP MATTER", WITH NO REQUIREMENT THAT THERE BE ANY NEXUS BETWEEN VIRGINIA AND THE "PARTNERSHIP MATTER" OF A NON-RESIDENT PARTNERSHIP, IS UNCONSTITUTIONAL UNDER SECTION 1 OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AS AN OVERREACHING OF STATE COURT JURISDICTION.

The statute alleged to be unconstitutional is the partnership statute on service of process, which requires only that, "the matter in suit is a partnership matter." The statute draws no distinction between resident and non-resident partnerships and, although it is required that the subject matter be a partnership matter, there is no requirement of any contact whatsoever between the subject matter and Virginia. Section 8.01-304, 1950 Code of Virginia,

as amended [p. 3a], superceding Section 8-59.1 [p. 3, *supra*], under which process in the suit on the partnership debt was served. This statutory provision contrasts with the process statutes relating to foreign corporations and unincorporated associations with the principal office outside Virginia. The foreign corporation must either be authorized to transact business in Virginia, be actually transacting business in Virginia or the subject matter must be specifically enumerated in the "long arm" statute before a Virginia court may assert subject matter jurisdiction. Section 8.01-301, 1950 Code of Virginia, as amended [p. 37a]. An unincorporated association with its principal office outside Virginia must be transacting business or affairs in Virginia before a Virginia court may assert subject matter jurisdiction. Section 8.01-306, 1950 Code of Virginia, as amended [p. 38a].

The partnership process statute also contrasts with the "long arm" statute. This statute includes partnerships, corporations and unincorporated associations, and the only causes of action which may be asserted thereunder are those which have the constitutionally requisite nexus with Virginia. Sections 8.01-328 and 328.1, 1950 Code of Virginia, as amended [p. 39a-40a].

There can be no dispute, in Virginia or elsewhere, with the general proposition of law that,

> "In every case there must not only be jurisdiction of the person and the subject matter, but the person and the subject matter must be brought before the court in a manner authorized by law; otherwise, the judgment or decree is void and not merely voidable and may be set at naught either by a direct proceeding in the case in which it was rendered or by collateral attack."

Brenham v. *Smith,* 120 Va. 30, 35, 90 S.E. 657, 658 (1916). Subject matter jurisdiction and *in personam* are different, both must be present in order for the judgment of a court to be valid and subject matter jurisdiction has territorial limitations, restricted by due process.[5] A comparison of the Virginia statutes above shows that there is a *constitutional vacuum* with respect to subject matter jurisdiction over the affairs of non-resident partnerships which is not present as regards corporations and unincorporated associations. The anomaly is immediately apparent: Virginia courts clearly could not have exercised subject matter jurisdiction over the non-resident partnership's alleged debt under the long arm statute, the most liberal expansion of jurisdiction in the history of our jurisprudence.

[5] *Willis* v. *Semmes, Bowen & Semmes,* 441 F.Supp. 1235 (E.D. Va.), illustrates the territorial limitations which due process places upon the subject matter. *Willis* was a suit under the Virginia long arm statute by a citizen of Virginia against a non-resident partnership. The complaint involved three basic causes of action, and with regard to the first, the Court found that it had *in personam* jurisdiction over the defendants. The second and third counts were dismissed, however, the Court stating that, ". . . although the defendant may be properly before the court on one cause of action where personal jurisdiction has been obtained under the long arm statute, he needn't be subject to jurisdiction on causes of action that do not have the statutorily required nexus with forum activities." 441 F.Supp. at 1243. The Court went on to say that it must observe the statute's requirement of a connection between the enumerated activities and the cause of action, and quoted *Shaffer* v. *Heitner,* 433 U.S. 186, as reemphasizing "the necessity, in those cases where the traditional predicates of jurisdiction have not been satisfied, of a connection between the forum activity and the cause of action." 441 F.Supp. at 1243-44.

The Wisconsin statute on service of process on partnerships [pp. 38b-41b] is an example of the recent legislative awareness of the territorial limitations of subject matter jurisdiction and the necessity of insuring that such limitations expressly apply to partnerships (more fully discussed in Section IB *infra*). That statute requires that the cause of action arise out of partnership activities within the state sufficient to subject a defendant to jurisdiction under Wisconsin's long arm statute.

However, under the decisions of the courts below, Virginia is able to do so under the earlier partnership process statute, which requires no contacts with Virginia and whose counterparts with respect to corporations and unincorporated associations require the transaction of business or affairs within the State or the subject matter nexus required by the "long arm" statute.

A. The Virginia statute and decisions clearly violate the due process standards set forth in International Shoe and its progeny, which control "all assertions of state court jurisdiction", and now is the time for non-resident partnerships to be specifically recognized as included in "all".

In affirming the constitutionality of a statute which sanctions the exercise of subject matter jurisdiction without a requirement of any contact with the forum, the decisions below clearly violate the standards set forth in *International Shoe Co.* v. *Washington,* 326 U.S. 310, and *Hanson* v. *Denckla,* 357 U.S. 235, and recently reaffirmed in *Shaffer* v. *Heitner,* 433 U.S. 186, and *Rush* v. *Savchuck,* 444 U.S. ____, 100 S.Ct. 571. Under the Federal Rules, a partnership is treated as an entity for the purpose of asserting a federal constitutional right. F.R. Civ. P. 17(b)(1).

The non-resident partnership conducted no activities of any nature in Virginia. Its "partnership matters," particularly those at issue here which occurred solely within the District of Columbia with a Maryland corporation, were beyond the subject matter jurisdiction of the Circuit Court of Arlington County. The fortuitous location within Virginia of the personal home of one of the general partners of a non-resident partnership does not furnish a constitutional contact of any jurisdictional significance for the assertion of jurisdiction over the partnership's

business and affairs. This has long been recognized by the Restatement.

> "The mere fact that one of the partners or members of the association is found within the State is not a sufficient basis for exercising jurisdiction over the partnership or association. Even though the partnership or association does business within the State, the courts of the State acquire jurisdiction over it only as to causes of action arising out of the business done in the State."

Restatement, Judgments, Section 24, p. 115. No policy is discernible why Virginia should have insisted on the exercise of state court jurisdiction over the non-resident partnership at the demand of a Maryland corporation. The omission from the Virginia statute of any requirement of minimal contacts for the assertion of subject matter jurisdiction over a "partnership matter" renders the statute unconstitutional on its face.

B. The widespread and growing use of limited partnerships as an important legal mechanism for structing investment in commercial real estate requires that the constitutional vacuum permitted for non-resident partnerships in approximately half the states, including Virginia, be filled.

Whatever the reason for the constitutional vacuum, the increasing tempo and widespread use of limited partnerships make it clear that the vacuum should no longer be permitted to await individual state action. Action by this Court is constitutionally necessary. Although the business of many partnerships is still peculiarly localized, it is now not uncommon, as it might have been in the past, to have

one or more general partners who reside in states other than that in which the partnership conducts its business, especially in metropolitan areas.

The constitutional problem is not present if jurisdiction is asserted under a "long arm" statute, as subject matter jurisdiction is carefully incorporated into the provisions of such statutes. Unfortunately, the long arm statutes have provided such a convenient "jurisdictional checklist", which has passed constitutional muster, that it has seemed unnecessary to consider the fundamental distinction between *in personam* and subject matter jurisdiction. However, merely following the Virginia statute on partnerships did not solve the jurisdictional problems in this case, as jurisdiction was asserted over a non-resident partnership without the benefit of the checklist afforded by a long arm statute. The fact that the Virginia statute does not incorporate the contact requirements for subject matter jurisdiction emphasizes the necessity of remembering that in order to render a valid judgment, a court must have both potential subject matter jurisdiction (the right to hear and determine controversies of a given nature) *and* active subject matter jurisdiction – the right to exercise potential jurisdiction in a given case. *Farant Invest. Corp.* v. *Francis,* 138 Va. 417, 427, 122 S.E. 141, 144 (1924). Throughout this proceeding, the partner has contended that while the Circuit Court of Arlington County had potential subject matter jurisdiction over a dispute involving a partnership debt, it lacked active jurisdiction, as the limitations of Federal due process and the Federal system itself denied it the power to bring the subject matter properly before the court.

The statutes collected in Appendix B show that in approximately half the states, either the contact requirement or a requirement of registration of non-resident partner-

ships transacting business in the state is specifically recognized in statutory provisions relating to non-resident partnerships. Conversely, the constitutional vacuum is present in approximately half of the states, which, like Virginia, have no requirement of any minimal contacts with the subject matter as a prerequisite to exercising jurisdiction over the affairs of a non-resident partnership. It is significant that eleven statutes requiring contacts have been enacted since 1977,[6] demonstrating the growing use of limited partnerships in recent years and the significant and recurring problems in litigation relating to non-resident partnerships. The National Conference of Commissioners on Uniform State Laws recognized this problem in 1976 when it promulgated a revision to the Uniform Limited Partnership Act [pp. 1b-4b]. The revision requires registration of a non-resident limited partnership transacting business in the state and provides for the appointment of the Secretary of State as agent for service of process for causes of action *arising out of the transaction of business in the state* if the non-resident partnership fails to register. The ever increasing interstate use and importance of limited partnerships, and the non-resident partnership problems and disparity of treatment by the various states, has been also extensively commented upon in legal periodicals.[7]

It goes without saying that rights guaranteed under the United States Constitution must be both uniform in their application to persons affected (i.e., corporations, unin-

[6]1979: Alabama, Arkansas, Mississippi, Oklahoma, Oregon (revision), New York and Wyoming; 1978: Kentucky, New Mexico and West Virginia; 1977: Texas.

[7]Kratovil & Werner, "Fixing Up the Old Jalopy – The Modern Limited Partnership under the UPLA," 50 St. John's L.Rev. 51 (1975) [citing twelve other law review articles on the subject]; "Foreign Limited Partnerships: A Proposed Amendment to the Uniform Limited Partnership Act," 47 S.Cal. L.Rev. 1174 (1974).

corporated associations and partnerships) and uniform in their application by the various states. The uncertainty and disparity in the application of due process as regards the assertion of subject matter jurisdiction over the affairs of non-resident partnerships requires the definitive guidance of this Court in this appeal.

C. The decisions below involve plain error.

The partner has presented his contention that the Virginia statute violates due process and is unconstitutional on its face to: (1) the Commissioner in Chancery; (2) the Circuit Court of Arlington County; and (3) the Supreme Court of Virginia. All have assiduously avoided ruling on the question.

This is not a case of error where the record merely "fails to show" the presence of the crucial element — the existence of minimal contacts between the subject matter and the forum. On the contrary, the record affirmatively shows the complete lack of any business contacts of the non-resident partnership with Virginia and the complete lack of any contacts of the specific partnership matter in suit with Virginia. Even though the omission of the due process requirement renders the statute unconstitutional on its face, the courts below did not even have the option of attempting to hold the judgment valid by "reading the due process requirement into the statute." The only alternative was silence.

The question is substantial and involves every state in which a general partner of a non-resident partnership resides. As shown by the survey of state statutes, there is a recent, clearly emerging pattern of states' revising their statutes to provide the minimum contacts requirements as

the use of limited partnerships becomes a widespread and indispensable tool of economic investment.

The issue is not whether a Virginia court may subject the partner, a resident, to its process. A Virginia court certainly has that potential power, just as the Minnesota court in *Rush* v. *Savchuck,* 444 U.S. ____, 100 S.Ct. 571, had that potential power over a domesticated insurance company. The question is whether a Virginia court has the power to enforce a derivative joint liability on the partner based upon a cause of action having no contacts whatever with Virginia. As in *Rush,* that question must be similarly answered in the negative: ". . . the party with forum contacts can only be reached through the out of state party, . . .". 100 S.Ct. at 579. The trial court held that it was immaterial if the prior judgment against the partnership were void, as the property being subjected to the lien of the judgment was the individual property of the partner.[8] This is another example of the court bootstrapping its own jurisdiction, as the law is clear that the partner could have no joint liability to the Maryland corporation until there was a judicial determination of the liability of the nonresident partnership to the Maryland corporation. An attempt by a Virginia court to exercise power over that subject matter would be unconstitutional, with or without a statute purporting to sanction the jurisdiction. The fact that the courts below upheld the validity of a statute unconstitutional on its face is plain error.

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[8]"The question of jurisdiction can be raised at any time; however, it is noted that no comment is necessary relative to the validity of the prior judgment against the partnership. The property being subjected to the lien of the judgment is not partnership property and the judgment was also against Clifford J. Hynning individually." [p. 3a]. However, the judgment was not entered jointly and severally.

II. A STATE STATUTE CHALLENGED UNDER THE CONCEPT OF CONSTITUTIONAL DISTRIBUTION OF POWERS AMONG THE STATES, AS AN OVERREACHING OF STATE COURT JURISDICTION BEYOND DUE PROCESS, MAY NOT BE VALIDATED IN THIS CASE BY PRECLUSION.

The trial court frankly recognized that, "the issue of subject matter jurisdiction was not phrased in that precise term" in the prior action [p.5a], but went on to hold that the "concepts asserted were identical" and that the partner was barred in this execution action from raising the issue of the validity of the prior judgment. The pleadings and briefs upon which the trial court relied in reaching this decision begin at p. 17a, in an excerpt from the Petition for Appeal to the Supreme Court of Virginia. It is abundantly clear from the record that the questions raised in the prior action related to forum *non-conviens,*[9] *in personam* jurisdiction over the non-resident partnership and the choice of law provision in the note. The trial court in that action overruled a Plea in Abatement and a Motion to Quash Service on Caravel Office Building Company. Neither made any reference to due process or the constitution and both were denied without briefs or opinion from the court.

The due process claim relating to *in personam* jurisdiction was presented, along with the other assigned errors, to the Supreme Court of Virginia in a Petition for Appeal. However, the Virginia Supreme Court, in its discretion, declined to hear the appeal and refused the Petition, rendering no opinion on any of the issues presented. In its Brief in Opposition to the Petition for Writ of Certiorari,

[9]By definition, a plea of forum *non conviens* cannot encompass a claim of lack of subject matter jurisdiction, as it contemplates more than one forum where jurisdiction and venue are technically correct. *Neirbo Co.* v. *Bethlehem Shipping Corp.*, 308 U.S. 165.

the Maryland corporation strongly argued that no federal constitutional question at all had been raised and decided, and well stated in the *in personam* issue presented: that the personal residence of the partners alone made the partnership a domiciliary both of Virginia and Maryland, citing *Milliken* v. *Meyer*, 311 U.S. 457, for the proposition that domicile alone is sufficient to subject an absent defendant to *in personam* jurisdiction in the courts of the domiciliary state.[10] [pp. 31a-32a]. The partner argued that his personal residence alone could not constitutionally provide the basis for domicile of the partnership. That issue, of course, requires no inquiry into the nexus of the subject matter. All parties agree that the constitutionality of the statute was never called into question in the prior action.

Aside from the fact that the constitutional questions here presented were clearly, on the record, not decided in the prior case, there are other compelling reasons why no theory of preclusion should apply to this action to enforce the judgment. This is not a case where issues of *fact* necessary to sustain subject matter jurisdiction were litigated, resulting in a judicial finding of fact supporting the exercise of jurisdiction.,[11] Nor is it a situation where a court, keeping within the limits of due process, exceeded some special jurisdiction granted by statute, cor-

---

[10]"In our present case we have actual, valid personal service on the general partner of the defendant partnership, the requisite minimal contact being the fact that the general partner resided in Virginia. . .".

"Based on the above, your Respondent would submit that the domicile of the partnership can be the domicile of the general partners and that your Respondent could have proceeded either in Virginia or Maryland, where the other general partner, Carol Smith, resided." [p. 31a].

[11]For example, had the court below found that the non-resident partnership did, in fact, conduct business in Virginia, the partner would be precluded from relitigating that finding on this appeal.

rectable by the legislature or Congress, or, as in *St. Clair* v. *Righter,* 250 F.Supp. 148 (W.D.Va.) [disapproved in *Beaty* v. *M.S. Steel Co.,* 401 F.2d 157, 161 (4th Cir.)], exercised jurisdiction within the limits of due process but beyond that specifically authorized by the Virginia long arm statute.[12]

Rather, this appeal involves an overreaching of state jurisdictional power beyond the limitations imposed by due process and, as such, seriously disturbs the distribution of governmental powers and infringes upon a fundamental constitutional protection. The lack of such power cannot be conferred by consent, waiver, estoppel or any other means. Moreover, the constitutional infirmity in the Virginia statute, as well as that in approximately half the states which similarly have no contacts requirement, cannot be remedied by state legislative action, which obviously cannot confer power which it lacks. No theory of preclusion should apply to the allocation of constitutional power within the federal system when the exercise of power exceeds the limits imposed by the United States constitution.,

As an additional ground for failing to rule on the con-

---

[12]"The jurisdiction of a court is purely and simply a question of *power* — the power to create or affect legal interests which will be recognized as valid elsewhere. A limit is put on this power by the due process clause of the United States Constitution. * * * It goes without saying that the mere fact that the legislature has passed a statute does not permit an extension of jurisdiction beyond due process limits even if authorized by the legislation. Conversely, if the limits of state jurisdiction fall well within the scope of due process, this does not *restrict* the courts and prohibit them from extending their jurisdiction to the limits of due process even if such an assumption of latent power is not expressly authorized by the statute. This necessarily follows from the fact that the jurisdiction is a question of power which is ultimately defined by due process and not by state legislation. *St. Clair* v. *Righter,* 250 F.Supp. 148, 152 (W.D. Va.).

stitutional question, the Arlington Court found that the subject matter of the prior action was:

> ". . . the alleged debt owed by the Defendant to the Plaintiff. The basis of the Defendant's obligation was his relationship (partner) with the maker of the note. This in no way altered or diluted the legal effect of his *personal* obligation for the debt of the partnership. The 'subject matter' of the case remained the issue of his personal liability. Thus it seems to me that the trial court clearly had jurisdiction over the subject matter of the action, namely the debt of a defendant residing within the court's territorial jurisdiction" [p. 5a].

It is clear that the subject matter was the partnership debt. An examination of the Maryland corporation's complaint and the promissory note sued upon [pp. 13a-16a] clearly shows that liability was predicated exclusively upon the partnership obligation, alleged to have been contracted "through", not "by" the two general partners. It was signed by the general partners only in their representative capacities. The personal judgment against the partner was purely derivative, possible only after the Virginia court determined that the non-resident partnership was liable on the note. The partnership debt then, was the *entire* subject matter of that action. The partner's personal liability could not be adjudicated separately from that of the partnership, particularly since the Uniform Partnership Act provides that the liability of a general partner for a debt of this nature is joint, *not* joint and several. Section 50-15, 1950 Code of Virginia, as amended. In fact, the statute upon which the Marlyand corporation rests its entire case for jurisdiction requires that the subject matter of the action be a "partnership matter".

Assume, *arguendo*, that the Circuit Court of Arlington County was correct in holding that the prior action had a dual subject matter, i.e., the obligation of the partnership and "the debt of a defendant residing within the court's territorial jurisdiction" [p. 5a]. It is still necessary for the Virginia court to have Constitutional jurisdiction over the the subject matter of the partnership debt before it can proceed to make the determinations which are conditions precedent to finding a personal liability of the partner for the partnership debt. In fact, the Arlington Court so found by holding that, "*the basis of the Defendant's obligation* was his relationship (partner) with the maker of the note" [p. 5a, emphasis supplied]. However, the court then proceeded to ignore the "basis of the Defendant's obligation" (the debt of the non-resident partnership) and the constitutional requirements for adjudicating that basis. Consequently, if the judgment against the partnership is void for lack of subject matter jurisdiction, there is nothing upon which to predicate a derivative judgment against the partner, and such a judgment cannot be enforced in this creditor's bill.

This Court recently considered an analogous situation in *Rush* v. *Savchuck*, 444 U.S. ____, 100 S.Ct. 571, in which a Minnesota resident filed a *quasi in rem* action in Minnesota against an Indiana resident and his insurer arising out of an automobile accident which occurred in Indiana. The plaintiff sought to garnish the insurer's obligation to defend and indemnify the tort-feasor. The insurer transacted business in Minnesota, the tort-feasor had no contacts whatever with Minnesota and no personal judgment was sought against the tort-feasor. In reversing the Minnesota Supreme Court's decision that jurisdiction over the non-resident tort-feasor was constitutional, this Court

held that the insurer's liability to indemnify was totally predicated upon a finding of liability on the part of the non-resident tort-feasor, who had no significant jurisdictional contacts with the forum which would constitutionally support an exercise of jurisdiction over the subject matter. This is the situation which obtains on this appeal except, of course, that the Circuit Court of Arlington County entered a personal judgment against the partner (in *Rush*, the insurance company) for the liability of the non-resident partnership (in *Rush*, non-resident tort-feasor).

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Frank E. Brown, Jr.
Barham, Radigan, Suiters &
Brown, P.C.
2009 North 14th Street, Suite 410
Arlington, VA 22216
(703) 841-0011
Counsel for Appellant

Date:

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 10th day of April, 1980.

Clifford J. Hynning, Appellant,

against Record No. 791082
Circuit Court No. C-28334

Dufief Mortgage, Inc., et al., Appellees.

From the Circuit Court of Arlington County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: /s/ Richard R. Buick
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

DuFIEF MORTGAGE, INC.	)	
	)	
Complainant	)	
	)	
v.	)	In Chancery No. 28334
	)	
CLIFFORD J. HYNNING, et al.	)	
	)	
Defendants	)	
	)	

MEMORANDUM

FROM: HONORABLE CHARLES H. DUFF, Judge

TO: GRIFFIN T. GARNETT, III, Esquire, Counsel to Complainant

FRANK E. BROWN, Jr., Esquire, Counsel to Defendant Clifford J. Hynning

In this Creditor's Bill to Enforce the Lien of a Judgment against the Defendant Hynning, the Commissioner in Chancery has rendered his report recommending the sale of the property and payment of various liens in order of priority. The Defendant has filed six Exceptions to the Commissioner's Report and detailed arguments have been heard in support of and in opposition to the Exceptions. The authorities cited have been reviewed and it appears that the Exceptions pose two distinct concepts which should be addressed. The first raises the issue of whether the residential property in question is held by the Defendant as a joint tenant with his daughter with the right of survivorship or in his name solely. The Commissioner found the latter. The second concept embraces the Defen-

dant's contention that the original judgment which the Bill seeks to enforce is void because the trial court rendering such judgment had no valid jurisdiction over the subject matter of the action. These points will be addressed in the order indicated.

With respect to the first issue [omitted as wholly a matter of State law]

* * *

Turning then to the second concept involved, the Defendant contends that the original judgment in favor of the Complainant is void on the ground that the trial court had no subject matter jurisdiction even though it had *in personam* jurisdiction of Clifford J. Hynning individually. The thrust of the argument in short paraphrase, is that the note upon which the judgment was based was a foreign partnership obligation having no relationship to Virginia; that the partnership conducted no business in Virginia; that it had no employees working in Virginia; that the only possible basis of jurisdiction in Virginia was the residence of Clifford J. Hynning. To assert jurisdiction under such circumstances, contends the Defendant, would violate the "minimal contacts" concept and would also be violative of due process.

The question of jurisdiction can be raised at any time; however, it is noted that no comment is necessary relative to the validity of the prior judgment against the foreign partnership. The property being subjected to the lien of the judgment is not partnership property and the judgment was also against Clifford J. Hynning individually.

I have carefully reviewed the file in the case of *Bogley* v. *Hynning*, Law No. 18633, the Petition for Appeal to the Virginia Supreme Court and the Petition for Writ of

Certiorari to the United States Supreme Court and it is clear from these various documents that the identical issue was presented, *inter alia,* and decided adversely to the Defendant. In the Petition for Appeal Mr. Hynning stated on page 3:

> "The Plea in Abatement was based upon the contention that the action was local to the District of Columbia and should only be heard in the courts of that jurisdiction."

Question III presented for review in the Petition for Appeal was phrased as follows:

> "When a promissory note is executed for a loan, the funds from which are used by a District of Columbia partnership for the purpose of constructing an office building in the District of Columbia, the note is delivered in the District of Columbia, is secured by real estate located in the District of Columbia and recites that it is to be governed by the laws of the District of Columbia, and the only connection the transaction has with Virginia is the residence of one general partner of the partnership, should the Virginia courts refuse to take cognizance of an action on the note when such action may be maintained by the plaintiff in the District of Columbia?"

In the Petition for Writ of Certiorari filed with the Supreme Court of the United States, the first question presented was phrased as follows:

> "1. Is the due process clause of the 14th Amendment to the Constitution of the United States violated if a forum state, without consent,

a. exercised jurisdiction over a non-resident limited partnership without even any "minimal contacts" with the forum state?

b. serves process on a non-resident partnership, without even any "minimal contacts" with the forum state, at the personal residence (non-business) of one of the partners in the forum state?"

A careful reading of the able arguments presented in the prior case indicates that while the issue of subject matter jurisdiction was not phrased in that precise term, the concepts asserted were identical and could not have escaped the attention of the appellate courts. The denial of the appeals in effect confirmed the trial court's determination that it had jurisdiction. It is noted further that the present Complainant is in privity with the Plaintiff in the prior case and it is my judgment that the Defendant is barred in this action to raise the issue of the validity of the original judgment.

Apart from the fact, however, that the issue has been decided adversely to the Defendant, it is noted that the subject mater of the *Bogley* v. *Hynning* case was the alleged debt owed by the Defendant to the Plaintiff. The basis of the Defendant's obligation was his relationship (partner) with the maker of the note. This in no way altered or diluted the legal effect of his *personal* obligation for the debt of his partnership. The "subject matter" of the case remained the issue of his personal liability. Thus it seems to me that the trial court clearly had jurisdiction over the subject matter of the action, namely the debt of a defendant residing within the court's territorial jurisdiction.

These two concepts, as indicated above, cover all of the six Exceptions to the Commissioner's Report. The Excep-

tions are overruled and the Report will be confirmed. If Mr. Garnett will prepare an appropriate Decree and submit the same to Mr. Brown for approval as to form and the preservation of exceptions as desired, it will be promptly entered.

March 27, 1979.

/s/ Charles H. Duff
Judge

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

DuFIEF MORTGAGE, INC.,	*	
	*	
Complainant	*	
	*	IN CHANCERY
v.	*	NO. 28334
	*	
CLIFFORD J. HYNNING, et al.,	*	
	*	
Defendants	*	

DECREE OF SALE

THIS CAUSE came on this day to be heard on the papers formerly read and on the report of Denman T. Rucker, Commissioner in Chancery for the Circuit Court of Arlington County, Virginia, to whom the papers in the cause were referred by decree heretofore entered; upon the Defendant's, CLIFFORD J. HYNNING's, Exceptions to the said Commissioners Report and upon Plaintiff's motion for entry of an Order confirming the said Commissioner's Report, appointing a Special Commissioner of Sale and ordering the sale of the property that is involved in this proceeding and upon the argument of counsel;

UPON CONSIDERATION of the premises and the Court being of the opinion upon a full review of the findings of the Commissioner in Chancery and the argument of counsel at the hearing on Exceptions duly filed to the Commissioner's Report, that the findings of the Commissioner are supported by the totality of the evidence, it is accordingly

ADJUDGED, ORDERED and DECREED that the Exceptions duly filed to the Commissioner's Report herein be and hereby are denied, and it is further

ADJUDGED, ORDERED and DECREED that the Commissioner's Report filed herein is supported by the totality of the evidence and is hereby confirmed.

* * *

[Recitations not material to appeal omitted]

The Court doth further ADJUDGE, ORDER AND DECREE that Griffin T. Garnett, III, is hereby appointed Special Commissioner of Sale and is directed to offer for sale at public auction for cash, subject to confirmation of this Court, in front of Arlington Courthouse, Arlington, Virginia or such other place as determined by the herein appointed Commissioner after advertising the time, place and terms of sale at least once a week for four (4) successive weeks in the Northern Virginia Sun, a newspaper published in Arlington County and having general circulation in Arlington County, Virginia, the followign described house and lot, to-wit:

* * *

[legal description and terms of sale omitted]

WHEREAS the Special Commissioner is to receive no funds, it is ORDERED that no bond be required of said Special Commissioner.

It is further ORDERED that said sale be subject to confirmation by the Court and the Special Commissioner shall report his actions taken pursuant hereto to the Court.

ENTERED this 20th day of April, 1979.

/s/ Charles H. Duff
JUDGE

NOTICE OF APPEAL, filed May 2, 1980.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

DuFIEF MORTGAGE, INC. (Formerly Bogley, Harting, Mahoney & Lebling, Inc.) A Maryland Corporation	)	
Complainant	)	*IN CHANCERY NO. 28334*
v.	)	
CLIFFORD J. HYNNING,	)	
Principal Defendant	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Clifford J. Hynning, the Principal Defendant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Virginia, refusing the Petition for Appeal of Clifford J. Hynning and affirming the judgment of the Circuit Court of Arlington County, Virginia that the judgment upon which execution is sought is not void, entered in this action on April 10, 1980.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

/s/ Frank E. Brown, Jr.
Frank E. Brown, Jr.
2009 North 14th Street
Arlington, VA 22216
(703) 841-0011
Counsel for Clifford J. Hynning

PROOF OF SERVICE

I, Frank E. Brown, Jr., a member of the bar of the Supreme Court of the United States, certify that on this 2nd day of May, 1980, one copy of the foregoing notice of Appeal was mailed, postage prepaid, to: Griffin T. Garnett, III, 2000 North Street, P.O. Box 1728, Arlington, VA 22216 (Counsel for DuFief Mortgage, Inc.,); United Virginia Bank – National, Trustee, c/o Thomas E. Sebrell, III, 515 King Street, Alexandria, VA 22314; Commonwealth Abstract Corporation, Trustee, c/o James H. Simmonds, Registered Agent, 1500 North Courthouse Road, Arlington, VA 22216; Louis H. Bean, 3714 North Randolph Street, Arlington, VA 22207; R. Terrence Ney, Esquire, 4103 Chain Bridge Road, P.O. Box 338, Fairfax, VA 22030 (Counsel for Louis H. Bean); James Ray Cottrell, Esquire, 411 North Washington Street, P.O. Box 1286, Alexandria, VA 22313 (Counsel for Rudd's Swimming Pool Supply Co., Inc.); Mary Cook Hackman, Attorney at Law, 2009 North 14th Street, P.O. Box 1647, Arlington, VA 22216 (Counsel for Genevieve H. Leggett and Anne Crutcher.

I further certify that all parties required to be served have been served.

/s/ Frank E. Brown, Jr.
Frank E. Brown, Jr.

Assignments of Error and Questions Presented for Review to the Supreme Court of Virginia in Clifford J. Hynning, Petitioner v. DuFief Mortgage, Inc., et al., Respondents, Record No. 791082.

ASSIGNMENTS OF ERROR

Pursuant to Rule of Court 5:21, Hynning respectfully submits that the trial court erred:

1. In refusing to rule on the question of whether the Circuit Court of Arlington County constitutionally lacked subject matter jurisdiction to enter judgment against the District of Columbia partnership and, derivitively, against its general partner Hynning, in the action styled *Bogley, Harting, Mahoney & Lebling, Inc.* v. *The Caravel Office Building Company, a District of Columbia partnership and Clifford J. Hynning, et al.*, Law No. 18633, and in refusing to rule on the question of whether the Virginia statute pursuant to which the District of Columbia partnership was purportedly brought before the Circuit Court of Arlington County is unconstitutional and void.

2. In ruling that the constitutional question presented had been previously litigated and decided adversely to Hynning and the District of Columbia partnership.

3. In overruling Hynning's exceptions to the Commissioner's Report, affirming, without specifically deciding, the subject matter jurisdiction of the Circuit Court of Arlington County, in assuming, without deciding, the constitutionalilty of the challenged Virginia statute, and in entering the Decree ordering the sale of Hynning's personal residence.

4. In holding that the subject matter of the prior action, Law No. 18633, was the "alleged debt owed by the Defen-

dant [Hynning] to the Plaintiff," without regard to the non-resident partnership.

QUESTIONS PRESENTED FOR REVIEW

1. When it is common ground between the parties that at no time in prior litigation between them had the constitutionality of a statute been challenged, may a trial court presented with that specific issue, assume that an appellate ruling has been rendered upholding the constitutionality of the statute by denial of a Petition for Writ of Error by the Supreme Court of Virginia and denial Petition for Writ of Certiorari by the Supreme Court of the United States because other issues were litigated in which the trial court felt that, the concepts asserted were identical and could not have escaped the attention of the appellate courts"? [Assignment of Error Nos. 1 & 2].

2. Is former §8-59.1, 1950 Code of Virginia [now §8.01-304] unconstitutional on its face because it contained no requirement that a non-resident partnership have any minimal contacts with a forum of subject matter jurisdiction by the courts of that state? [Assignment of Error Nos. 1, 2 & 3]

3. Did the Circuit Court of Arlington County lack subject matter jurisdiction to adjudicate a suit on a promissory note executed by a non-resident partnership whose only contact with Virginia was the personal residence of one of its general partners? [Assignment of Error Nos. 1, 2, 3 & 4].

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

BOGLEY, HARTING, MAHONEY & LEBLING, INC., A Maryland Corporation 7000 Wisconsin Avenue Chevy Chase, Maryland, *Complainant*,	
vs.	IN CHANCERY NO. _____
THE CARAVEL OFFICE BUILDING COMPANY, A District of Columbia partnership SERVE: Clifford J. Hynning, General Partner 3700 North Military Road Arlington, Virginia	
and	
CLIFFORD J. HYNNING 3700 North Military Road Arlington, Virginia	
and	
CAROL H. SMITH 1034 North Calvert Street Baltimore, Maryland	

BILL OF COMPLAINT

COMES NOW the Complainant, by counsel, and in support of this Bill of Complaint states as follows:

1. The Complainant, BOGLEY; HARTING, MAHONEY & LEBLING, INC., hereinafter referred to as BOGLEY, is a Maryland corporation engaged in the mortgage brokerage business and has been so engaged and licensed in said business in the District of Columbia, Maryland and Virginia for anumber of years.

2. The Defendant, THE CARAVEL OFFICE BUILDING COMPANY, hereinafter referred to as CARAVEL, is a District of Columbia limited partnership.

3. The Defendant, CLIFFORD J. HYNNING, is a general partner in said partnership and is a resident of Arlington County, Virginia.

4. The Defendant, CAROL H. SMITH, is a general partner in said partnership and is a resident of Baltimore, Maryland.

5. On February 28, 1969, the Defendant CARAVEL through its partners Defendants CLIFFORD J. HYNNING and CAROL H. SMITH executed a Note payable to the Complainant in the amount of ONE HUNDRED THOUSAND DOLLARS, ($100,000), to be paid on December 31, 1970. A copy of said Note is attached hereto as Exhibit "A" and made a part hereof.

6. The Defeddant CARAVEL through its partners the Defendants CLIFFORD J. HYNNING and CAROL H. SMITH, secured the above mentioned Note by a Deed of Trust dated February 28, 1969. A copy of said Deed of Trust is attached hereto as Exhibit "B" and made a part hereof.

7. The Defendant CARAVEL through its managing general partner, CLIFFORD J. HYNNING, executed an extension of said Note to payment on demand and further

waiving demand, notice or protest. A copy of said extension is attached hereto as Exhibit "C" and made a part hereof.

8. Demand has been made and defautl has been made in payment of said Note and the balance is now due as evidenced by the Statement of Account attached hereto as Exhibit "D" and made a part hereof.

WHEREFORE, the Complainant, BOGLEY, demands judgment against the Defendants jointly and severally in the principal amount of SEVENTY-NINE THOUSAND AND SEVENTY-SIX AND 48/100 DOLLARS, ($79,076.48), with interest at the rate of eight percent per annum from the 14th day of July, 1972, reasonable counsel fees as provided for in the Deed of Trust and court costs.

BOGLEY, HARTING, MAHONEY
& LEBLING, INC.

By: s/s GRIFFIN T. GARNETT
Griffin T. Garnett, III
Its Counsel

GARNETT & KOSTIK

BY: s/s GRIFFIN T. GARNETT, III
Griffin T. Garnett, III
Counsel for Complainant

EXHIBIT A

PROMISSORY NOTE

TO: JOSEPH J. MAHONEY, JR. and CARVILLE J. CROSS
CONVEYING: Leasehold interest and estate in and to Lots 60, 61 and 62 in G.N. Hopkins and others [illegible] of Lots in Square 111

$100,000.00 Washington, D. C.
February 28, 1969

On December 31, 1970 the undersigned promises to pay to the order of BOGLEY, HARTING, MAHONEY & LEBLING, INC. ONE HUNDRED THOUSAND DOLLARS ($100,000.00) or so much thereof as may from time to time be advanced for value received at 7000 Wisconsin Avenue, Chevy Chase, Maryland, with interest from date of each advance at eight per centum per annum, until paid, payable monthly and at maturity; each installment of interest to bear interest after maturity, if not then paid, at the rate aforesaid. Said payments due on the first of each and every month.

AND it is expressly agreed that if default be made in the payment of any one of the aforesaid installments when and as the same shall become due and payable, then and in that event the unpaid balance of the aforesaid principal sum shall at the option of the holder hereof, at once become and be due and payable, anything hereinabove contained to the contrary notwithstanding.

This Promissory Note has been delivered in the District of Columbia by a limited partnership organized and doing business in the District of Columbia, is secured by real property located in the District of Columbia, and is to be governed by the laws of the District of Columbia.

THE CARAVEL OFFICE BUILDING COMPANY

Signed for Identification

BY: /s/ Carol H. Smith
General Partner

_____ /s/
Trustee

EXCERPT FROM THE PETITION FOR APPEAL OF CLIFFORD J. HYNNING IN CLIFFORD J. HYNNING, PETITIONER v. DuFIEF MORTGAGE, INC., et al., RESPONDENTS, SUPREME COURT OF VIRGINIA, RECORD NO. 791082.

EXHIBITS INCLUDED IN THE APPENDIX TO THE PETITION FOLLOW THE TEXT OF THIS EXCERPT.

In overruling Hynning's exceptions to the Commissioner's Report in this action, the trial court recognized that the question of subject matter jurisdiction may be raised at any time, but ruled that the question presented, i.e., that §8-59.1 "is unconstitutional on its face as it sanctions the exercise of subject matter jurisdiction without any requirement that due process be satisfied by the existence of minimal contacts over the subject matter," had been previously litigated in Law No. 18633 and decided adversely to Hynning. Judge Duff based this decision on the Court's file in the previous action, the Petition for Appeal to this Court in Law No. 18633 (which Petition was denied) and the Petition for a Writ of Certiorari filed with the Supreme Court of the United States (which Petition was denied). It is thus necessary to briefly summarize those documents to which the trial court had access in arriving at its decision.

1. In Law No. 18633, Hynning and the District of Columbia partnership filed a "Motion to Quash Service on Caravel Office Building Company, a District of Columbia Partnership", a copy of which appears in the Appendix beginning at page A-10. The motion was based upon the venue concept of forum *non conveniens,* as appears from paragraph 6 of the Affidavit attached to the motion:

> "There will be no substantial harm or hardship to plaintiff in relegating it to its remedy before the United States District Court for the District of

> Columbia, the District where all of the acts and transactions complained of took place. The granting of the motion to transfer venue will in no way deprive plaintiff of its day in court." [Appendix, p. A-13]

2. In Law No. 18633, Hynning and the District of Columbia partnership filed a "Plea in Abatement, or in the alternative, a Motion to Dismiss," a copy of which appears in the Appendix beginning at page A-14, contending that the action was a local action involving real property located in the District of Columbia, in which the parties had agreed to that the laws of the District of Columbia would govern and that therefore "it follows that the adjudication herein could best be performed by the courts of the District of Columbia." Again nowhere in this motion is jurisdiction, either personal or subject matter, mentioned.
* * *

3. In Law No. 18633, Hynning and the District of Columbia partnership filed a Petition for Appeal in this Court. The only Assignments of Error evenly remotely relevant to the questeion here presented are number 13, which reads: "[The trial court erred] [i]n refusing to dismiss this action based upon the defendants' motion that the Circuit Court of Arlington County was a forum non-convenience," and number 14, which reads: "[The trial court erred] [i]n failing to rule that the plaintiff was barred from using the Virginia Courts as a forum for this action, because of the choice of law provision agreed to by the parties in the promissory note." All of the Assignments of Error filed with this Court appear in the Appendix beginning at page A-18.

4. In arriving at its decision herein, the trial court quoted from the Petition for Appeal, Question Presented

No. III. That Question Presented is specifically designated as applicable to Assignments of Error numbers 13 and 14, and the entire text of the argument presented thereunder appears in the Appendix beginning at page A-20. The argument is consistent with the designated Assignment of Error, relating to forum *non conveniens.*

5. At arriving at its decision, the trial court also quoted from the Petition for Writ of Certiorari filed by Hynning and the District of Columbia Partnership, assuming that a "concept" identical to the subject matter jurisdiction question here raised was presented to the Supreme Court of the United States. Hynning, on the other hand, asserted that the question raised before the Supreme Court of the United States was one of *in personam* jurisdiction only. In its Brief in Opposition to the Petition for Writ of Certiorari, DuFief phrased the constitutional issue raised as follows:

> "1. Was the due process clause of the Fourteenth Amendment of the Constitution of the United States violated?
>
> (a) Was there valid personal service upon the Petitioner Clifford J. Hynning?
>
> (b) If there was valid personal service on the Petitioner Hynning, did this confer upon the Circuit Court of Arlington County, Virginia, personal jurisdiction over the Petitioners Hynning and Caravel Office Building Company?" [Appendix, p. A-22]

Hynning concedes that DuFief correctly stated that the issue raised was one of *in personam* jurisdiction.

6. In its Brief in Opposition to the Petition for Writ of Certiorari, DuFief agrees that the sole basis upon which

the action was brought before the Circuit Court of Arlington County was the personal residence of Hynning, by stating: "In our present case, we have actual, valid personal service on the general partner of the defendant partnership, the requisite 'minimal contact' being the fact that the general partner resided in Virginia. . .". [Appendix, p. A-23.

7. In its Brief in Opposition to the Petition for Writ of Certiorari, DuFief strongly contends that the constitutional questions which Hynning raises in this action were never passed upon by this [Virginia] Court, in direct contravention of its present position, adopted by the trial court, that such questions were ruled upon and decided adversely. The following quotations from DuFief's brief are relevant:

> "Furthermore, as shown in Petitioners' Appendix and in the attached Petitioners' Notice of Appeal and Assignment of Error, Supplemental Assignment of Error and Index to their Petition for Appeal in the Supreme Court of Virginia (pp. 4b, 7b & 8b), the Petitioners never presented to the Circuit Court of Arlington County, Virginia, or the Supreme Court of Virginia, any Federal question of substance. *At no time in the foregoing documents did the Petitioners contend that any of the applicable State statutes were unconstitutional.*" [Appendix, p. A-24, Emphasis supplied].
>
> * * *
>
> "As previously contended by your Respondent in the jurisdictional section, the petitioners have not raised any Federal questions sought to be

reviewed prior to the filing of their petition, and thus the Virginia Courts did not pass upon these questions." [Appendix, p. A-25].

* * *

"In summary, the Petitioners Hynning and Caravel Office Building Company were served with process in conformity with the applicable state statutes, the constitutionality of which have not been challenged." (Appendix, p. A-26, Emphasis supplied].

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

BOGLEY, HARTING, MAHONEY & & LEBLING, INC., A Maryland Corporation, 7000 Wisconsin Avenue, Chevy Chase, Maryland, *Complainant,*	)	
v.	)	
THE CARAVEL OFFICE BUILDING COMPANY, A District of Columbia partnership, 1555 Connecticut Avenue, N.W. Washington, D.C. 20036	)	In Chancery No. 26191
and	)	
CLIFFORD J. HYNNING, 3700 North Military Road, Arlington, Virginia	)	
and	)	
CAROL H. SMITH, 1034 North Calvert Street, Baltimore, Maryland. *Defendants.*	)	

MOTION TO QUASH SERVICE ON CARAVEL OFFICE BUILDING COMPANY, A DISTRICT OF COLUMBIA PARTNERSHIP

Comes now the defendant Caravel Office Building Company (hereinafter called "Caravel"), a limited partnership organized under the laws of the District of Columbia, by Clifford J. Hynning, managing general partner of said limited partnership, appearing pro se, and moves this Court to quash the return of service of summons on Caravel on the grounds that the defendant Caravel is a limited partnership

under the laws of the District of Columbia; defendant Caravel is not licensed to do business in Virginia and has engaged in no business there; and defendant Caravel, an indispensable party (on the face of the complaint and its exhibits), has not been properly served with process in this action, all of which more clearly appears from the affidavit of Clifford J. Hynning (hereinafter called "Hynning"), managing general partner of Caravel, as filed in the United States District Court for the Eastern District of Virginia in Civil Action No. 75-855-A, a copy of which is annexed hereto as defendant's Exhibit I.

CLIFFORD J. HYNNING, pro se, as
Managing General Partner of
CARAVEL OFFICE BUILDING COMPANY, A District of Columbia limited partnership,
Suite 301,
1555 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone No: 232-0775

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 1976, a copy of the above Motion to Quash, and the attached Defendants' Plea in Abatement and Answer was hand-delivered, to Griffin T. Garnett, III, Esq., Garnett and Kostik, 2000 North 16th Street, Arlington, Va. 22216

Clifford J. Hynning

* * *

DEFENDANT'S EXHIBIT: AFFIDAVIT

CLIFFORD J. HYNNING, being duly sworn, deposes and says:

1. I am a member of the bar of the District of Columbia, with law offices at 1555 Connecticutt Ave., NW, Washington, D. C.,; and I am also the managing general partner of Caravel Office Building Company (hereinafter called "Caravel").

2. Caravel is a limited partnership organized under the laws of the District of Columbia, with its business offices at 1555 Connecticut Ave., NW., Washington, D. C. Caravel's sole business consists of the ownership and management of an office building located at 1601 Connecticut Ave., NW, Washington, D. C. Caravel is not licensed to do any business except in the District of Columbia; nor does Caravel engage in business anywhere except in the District of Columbia.

3. All the records of Caravel are maintained and physically located at the partnership offices at 1601 Connecticut Ave., NW, Washington, D. C.

4. The parties to the transaction giving rise to this claim made an explicit choice-of-law provision (Plaintiff's Exhibit "A") as follows:

> "This Promissory Note has been delivered in the District of Columbia by a limited partnership organized and doing business in the District of Columbia, is secured by real property located in the District of Columbia, and is governed by the laws of the District of Columbia."

5. As appears from the above, this claim will be determined by the statutes and court decisions of the District

of Columbia. The United States District Court for the Eastern District of Virginia is not accustomed to trying cases exclusively governed by the laws of the District of Columbia, as are the federal courts sitting in the District of Columbia.

6. There will be no substantial harm or hardship to plaintiff in relegating it to its remedy before the United States District Court for the District of Columbia, the district where all of the acts and transactions complained of took place. The granting of the motion to transfer venue will in no way deprive plaintiff of its day in court.

/s/ Clifford J. Hynning
Clifford J. Hynning

Dist of Columbia.
Subscribed and sworn to before me this 27th day of December, 1975

/s/ Herman Jacobs
Notary Public
Comm. Exp. 12/14/80

* * *

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

BOGLEY, HARTING, MAHONEY & LEBLING, INC., A Maryland Corporation 7000 Wisconsin Avenue, Chevy Chase, Maryland, *Complainant,*	)	
v.	)	In Chancery No. 26191
THE CARAVEL OFFICE BUILDING COMPANY, A District of Columbia partnership, 1555 Connecticut Avenue, N.W. Washington, D.C. 20036	)	
and	)	
CLIFFORD J. HYNNING, 3700 N. Military Road, Arlington, Virginia	)	
and	)	
CAROL H. SMITH, 1034 N. Calvert Street, Baltimore, Maryland *Defendants.*	)	

PLEA IN ABATEMENT,
or in the Alternative, a Motion to Dismiss

Comes now Clifford J. Hynning, appearing pro se, individually, and as managing general partner of Caravel Office Building Company (hereinafter called "Caravel"), and moves this Court to abate or dismiss the action on the ground that, as appears on the face of the complaint and its supporting Exhibits A and B, it is grounded on a purely local action involving real property located within the District

of Columbia and, by agreement of plaintiff and defendants, is governed exclusively by the laws of the District of Columbia.

As grounds for this motion, defendants submit the following:

(a) The action is based on a note (complaint and plaintiff's exhibit A), which recited on its face the following choice-of-law provision:

> "This Promissory Note has been delivered in the District of Columbia by a limited partnership organized and doing business in the District of Columbia, is secured by real property located in the District of Columbia, and is governed by the laws of the District of Columbia."

and plaintiff's claim did not arise out of, or have any connection with, any business transaction by any defendant in this state and district.

(b) Defendant Caravel is a limited partnership organized under the laws of the District of Columbia; and Caravel's exclusive business consists of the ownership of the Caravel Office Building, title to which is held in the name of the partnership in accord with the specific provision of a District of Columbia statute authorizing a partnership to own real property in the partnership name, and, further, of the management and leasing of said building, and performs no other functions or activities, as more clearly appears from defendants' exhibit 1; and this action could have readily been brought by plaintiff in the United States District Court for the District of Columbia.

(c) All the witnesses and records are readily available in the District of Columbia; and, moreover, defendant Hyn-

ning as a member of the bar of the District of Columbia for several decades, can readily defend this action on behalf of all defendants without being put to the expense of employing counsel resident in Virginia and who are members of the bar of this Court.

(d) Upon the trial of this action it will be necessary to interpret the statutes and court decisions of the District of Columbia.

(e) By denominating its action "In Chancery" plaintiff is clearly relying on the deed of trust annexed to its complaint as plaintiff's exhibit B. By so doing, plaintiff, by definition, has filed a local action involving real property located outside the jurisdiction of this Court. The clear effect of the above, together with the choice of law provision contained on the face of the note, and set forth in para. (a) above, whereby the parties explicitly agreed that this transaction is to be exclusively governed by the laws of the District of Columbia, it follows that the adjudication herein should best be performed by the courts of the District of Columbia. In this connection, it should be noted that the plaintiff has already sought to invoke the diversity jurisdiction of the Eastern District of Virginia in Civil Action Number 75-855-A, dismissed in an order on February 13, 1976, by Judge Bryan.

The Plaintiff has available to it, the proper forum of the United States District Court for the District of Columbia, where all the named defendants agree to accept service, at the law offices of Clifford J. Hynning, Suite 301, 1555 Connecticut Avenue, N.W., Washington, D.C. 20036, and have the matter fully adjudicated by such court, applying the law of the District of Columbia, which is the law generally applied by the court to the transactions set forth in the complaint. There would consequently be no substantial

harm or hardship to the plaintiff in relegating it to its remedy before the United States District Court for the District of Columbia, and the district wherein all the acts and transactions complained of took place. The granting of this plea in abatement will in no way deprive the plaintiff of its day in court.

Respectfully submitted

CLIFFORD J. HYNNING pro se, and as counsel for defendants,
Suite 301,
1555 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone No. 232-0775

* * *

Excerpt from DuFief's "Brief in Opposition to Petition for Writ of Certiorari", page 6

ARGUMENT

For purposes of this argument, Respondent has categorized the issues that Petitioners have attempted to raise as follows:

1. Was the due process clause of the Fourteenth Amendment of the Constitution of the United States violated?

(a) Was there valid personal service upon the Petitioner Clifford J. Hynning?

(b) If there was valid personal service on the Petitioner Hynning, did this confer upon the Circuit Court of Arlington County, Virginia personal jurisdiction over the Petitioners Hynning and Caravel Office Building Company?

2. Was the full faith and credit clause of the Constitution of the United States violated?

(a) Did the forum err in applying its procedural laws?

(b) Did the forum follow the substantive laws of the District of Columbia in awarding judgment to the Respondent?

1. Was the due process law of the Fourteenth Amendment of the Constitution of the United States violated?

(a) Was there valid personal service upon the Petitioner Clifford J. Hynning?

* * *

Excerpt from DuFief's "Brief in Opposition to Petition for Writ of Certiorari", page 10

*** * * * In our present case we have actual, valid personal service on the general partner of the defendant partnership, the requisite "minimal contact" being the fact that the general partner resided in Virginia and thus, as set out in the** *Milliken* case, Virginia:

> . . . . which accords him privileges and affords protection to him and his property by virtue of his domicile may also extract reciprocal duties. "Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable" from the various incidences of state citizenship. (Page 463)

Based on the above, your Respondent would submit that the domicile of the partnership can be the domicile of the general partners and that your Respondent could have proceeded either in Virginia or Maryland, where the other general partner, Carol Smith, resided. * * *

Excerpt from DuFief's "Brief in Opposition to Petition for Writ of Certiorari", page 3

* * *

Furthermore, as shown in the Petitioners' Appendix and in the attached Petitioners' Notice of Appeal and Assignment of Error, Supplemental Assignment of Error and Index to their Petition for Appeal in the Supreme Court of Virginia (pp. 4b, 7b & 8b), the Petitioners never presented to the Circuit Court of Arlington County, Virginia or the Supreme Court of Virginia, any Federal question of substance. At no time in the foregoing documents did the

Petitioners contend that any of the applicable State statutes were unconstitutional. Having failed to raise these issues in the trial Court and highest State Court, the Petitioners should not be given the opportunity to raise them for the first time in this Court.

* * *

Excerpt from DuFief's "Brief in Opposition to Petition for Writ of Certiorari", page 5

* * *

As previously contended by your Respondent in the jurisdictional section, the Petitioners have not raised any Federal questions sought to be reviewed prior to the filing of their Petition, thus the Virginia Courts did not pass upon these questions. * * *

Excerpt from DuFief's "Brief in Opposition to Petition for Writ of Certiorari", page 17

* * *

In summary, the Petitioners Hynning and Caravel Office Building Company were served with process in conformity with the applicable state statutes, the constitutionality of which have not been challenged. * * *

ASSIGNMENTS OF ERROR

Pursuant to Rule of Court 5:21, Petitioners respectfully submit that the trial court erred:

1. In granting judgment to the Plaintiff.

2. In ruling that the loan transaction which was the subject of this case was not usurious.

3. In ruling that the $9,000.00 front end fee paid by the borrower (defendants) to the lender (plaintiff) does not constitute "interest".

4. In ruling that the loan transaction was not usurious after acknowledging that, in addition to the maximum legal rate of interest, the lender required the borrower to pay a fee prior to the lender funding the loan.

5. In ruling that the $9,000.00 front end fee was a loan commitment fee.

6. In ruling that a loan commitment fee does not constitute interest under circumstances where the fee goes to the same person who receives the interest.

7. In ruling that the intent of the parties is determinative of whether a front end fee constitutes interest or whether a loan transaction is usurious.

8. In ruling that an otherwise usurious loan transaction was made legal because of the intent – or the absence of bad intent – by the parties or the lender.

9. In ruling that a front end fee that was paid to the lender in connection with making the loan does not constitute interest because the loan was part of a total financing package.

10. In ruling that a front end fee paid to the eventual lender in connection with a loan is not interest as long as

the recipient of the fee was not obligated to actually fund the loan at the time the loan was paid.

11. In ruling that the party alleging usury must prove a correct intent to conceal it under an ostensibly lawful contract or transaction.

12. In ruling that the evidence was insufficient to establish that the loan transaction was usurious.

13. In refusing to dismiss this action based upon the defendants' motion that the Circuit Court of Arlington County was a forum non-convenience.

14. In failing to rule that the plaintiff was barred from using the Virginia Courts as a forum for this action, because of the notice of law provision agreed to by the parties in the promissory note.

15. In refusing to apply the procedural law of the District of Columbia.

16. In ruling that the action was not barred by the Virginia five-year Statute of Limitations which would have resulted in a dismissal of this action.

17. In refusing to apply the applicable District of Columbia STatute of Limitations which would have resulted in a dismissal of this action.

Argument From Petition for Appeal, referred to as Question III presented for review in the Opinion of the Arlington Circuit Court dated March 27, 1979

III. THE CIRCUIT COURT OF ARLINGTON COUNTY SHOULD NOT HAVE TAKEN COGNIZANCE OF THIS CASE SINCE IT WAS A PURELY LOCAL ACTION RELATING ONLY TO THE DISTRICT OF COLUMBIA.

As has been previously stated, this was an action on a promissory note evidencing a loan made to a District of Columbia partnership for the purpose of constructing a large commercial office building in the District of Columbia and was secured by real property located in the commercial zone of Washington. The note was delivered in the District of Columbia and Caravel's exclusive business was the ownership and management of the Caravel Office Building in the District of Columbia. Further, the note specifically stated that it was to be governed by the laws of the District of Columbia in accordance with the choice of law provisions of the Uniform Commercial Code previously cited. All records of Caravel were located in the District of Columbia. The *sole* contact with Virginia was the residence of one of Caravel's general partners. The fact that neither the partnership nor the transaction had any contact with Virginia is shown by the fact that even with the long-arm statute, Bogley was unable to effect service of process on Carol H. Smith, a general partner and resident of Maryland, who also signed the note and trust.

In the Plea in Abatement filed in the trial court, Caravel made it clear that it would readily accept service of process in the District of Columbia and that it would agree that the Arlington action should not be dismissed until such time as service was effected.

Since the trial court determined that the law of the District of Columbia would apply, and since litigation of the action in this neighboring jurisdiction would cause no inconvenience to Bogely, this alone should have been sufficient grounds for abatement of the Arlington action. The problems with regard to the applicable statute of limitations graphically illustrate the confusion which has arisen in this context, as it is abundantly clear that Bogley's insistence on Virginia was an effort to avoid the District of Columbia's three year statute of limitations.[6]

The choice of law provision specified in the promissory note makes no exception with regard to the distinction between the "substantive" and "procedural" law of the District of Columbia. Specifically, the purpose of such a choice of law provision is to enable the parties to obtain certainty and predictability in the application of the law to the contract they have negotiated. That certainty and predictability is defeated if the legal result can vary with regard to the nonsubstantive" law by virtue of forum shopping by one of the parties. The District of Columbia provided a convenient forum for both parties, particularly in light of Bogley's assertion in its Complaint that it was licensed to do business in the District of Columbia. The forum shopping engaged in by Bogley resulted in uncertainty as to the application of the District of Columbia law and the specific portions of the District of Columbia law to be applied, and prejudiced Caravel, which had a right to expect that its obligations under the note and the deed of trust would be determined fully by the law of the District of Columbia. See: *Farrier* v. *May Dept. Stores, Inc., supra.*

* * *

VA. CODE PROVISIONS:

§ 50-15. Nature of partner's liability. — All partners are liable:

(a) Jointly and severally for everything chargeable to the partnership under §§ 50-13 and 50-14;

(b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract. (1918, p. 545; Michie Code 1942, § 4359(15).)

§ 8.01-301. How process served on foreign corporations generally.— Service of process on a foreign corporation may be effected in the following manner:

1. By personal service on any officer, director or on the registered agent of a foreign corporation which is authorized to do business in the Commonwealth, and by personal service on any agent of a foreign corporation transacting business in the Commonwealth without such authorization, wherever any such officer, director, or agents be found within the Commonwealth; or

2. By substituted service on a foreign corporation in accordance with §§ 13.1-111 and 13.1-274, if such corporation is authorized to transact business or affairs within the Commonwealth; or

3. By substituted service on a foreign corporation in accordance with § 8.01-329 where jurisdiction is authorized under § 8.01-328.1, regardless of whether such foreign corporation is authorized to transact business within the Commonwealth; or

4. By order of publication in accordance with §§ 87.01-316 and 8.01-317 where jurisdiction in rem or quasi in rem is authorized, regardless of whether the foreign cor-

poration so served is authorized to transact business within the Commonwealth. (Code 1950, § 8-60; 1977, c. 617.)

§8.01-304. How process served on copartner or partnership. — Process against a copartner or partnership may be served upon a general partner, and it shall be deemed service upon the partnership and upon each partner individually named in the action, provided the person served is not a plaintiff in the suit and provided the matter in suit is a partnership matter.

Provided further that process may be served upon a limited partner in any proceeding to enforce a limited partner's liability to the partnership. (Code 1950, § 8-59.1; 1950, p. 455; 1977, c. 617.)

§ 78.01-306. [Unincorporated association]; principal office outside Virginia and business transactions in Virginia. — If an unincorporated (i) association, (ii) order, or (iii) common carrier has its principal office outside Virginia and transacts business or affairs in the Commonwealth, process may be served on any officer, trustee, director, staff member, or agent of such association, order, or carrier in the city or county in which he may be found or on the clerk of the State Corporation Commission, who shall be deemed by virtue of such transaction of business or affairs in the Commonwealth to have been appointed statutory agent of such association, order, or carrier upon whom may be made service of process. When served with such process, the clerk of the State Corporation Commission shall forthwith comply with § 8.01-312. Service, when duly made, shall constitute sufficient foundation for a personal judgment against such association, order or carrier. If service may not be had as aforesaid, then on affidavit of that fact an order of publication may

be awarded as provided by §§ 8.01-316 and 8.01-317. (Code 1950, § 8-66.1; 1962, c. 250; 1977, c. 617.)

§ **8.01-328. Person defined.**— As used in this chapter, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association or any other legal or commercial entity, whether or not a citizen or domiciliary of this State and whether or not organized under the laws of this State. (Code 1950, § 8-81.1; 1964, c. 331; 1977, c. 617.)

§ **8.01-328.1 When personal jurisdiction over person may be exercised.**— A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's

1. Transacting any business in this State;

2. Contracting to supply services or things in this State;

3. Causing tortious injury by an act or omission in this State;

4. Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State;

5. Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;;

6. Having an interest in, using, or possessing real property in this State;

7. Contracting to insure any person, property, or risk located within this State at the time of contracting; or

8. Having been ordered to pay spousal support or child support in a suit for divorce in this State in which a decree of divorce from the bond of matrimony or a decree of divorce from bed and board has been entered by a court of competent jurisdiction having in personam jurisdiction over such person.

B. When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him; provided, however, nothing contained in this chapter shall limit, restrict or otherwise affect the jurisdiction of any court of this State over foreign corporations which are subject to service of process pursuant to the provisions of any other statute. (Code 1950, § 8-81.2; 1964, c. 331; 1977, c. 617; 1978, c. 132.)

UNIFORM ACT (1976) PROVISION ON FOREIGN LIMITED PARTNERSHIPS (PART A) AND EXCERPTS FROM STATE STATUTES AND RULES EXPLICITLY APPLICABLE TO SUITS AGAINST FOREIGN LIMITED PARTNERSHIPS (PART B)

Part A. Article 9 on "Foreign Limited Partnerships" in the 1976 Promulgation of the "UNIFORM LIMITED PARTNERSHIP ACT" by the National Conference of Commissioners on Uniform State Laws

§ 901. Law Governing.
902. Registration.
903. Issuance of Registration.
904. Name.
905. Changes and Amendments.
906. Cancellation of Registration.
907. Transaction of Business without Registration.
908. Action by [Appropriation Official].

ARTICLE 9
Foreign Limited Partnerships

§901. Law Governing.—Subject to the Constitution of this State, (1) the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners, and (2) a foreign limited partnership may not be denied registration by reason of any difference between those laws and the laws of this State.

§902. Registration.—Before transacting business in this State, a foreign limited partnership shall register with the Secretary of State. In order to register, a foreign limited partnership shall submit to the Secretary of State, in

duplicate, an application for registration as a foreign limited partnership, signed and sworn to by a general partner and setting forth:

(1) the name of the foreign limited partnership and, if different, the name under which it proposes to register and transact business in this State;

(2) the state and date of its formation;

(3) the general character of the business it proposes to transact in this State;

(4) the name and address of any agent for service of process on the foreign limited partnership whom the foreign limited partnership elects to appoint; the agent must be an individual resident of this state, a domestic corporation, or a foreign corporation having a place of business in, and authorized to do business in, this State;

(5) a statement that the Secretary of State is appointed the agent of the foreign limited partnership for service of process if no agent has been appointed under paragraph (4) or, if appointed, the agent's authority has been revoked or if the agent cannot be found or served with the exercise of reasonable diligence;

(6) the address of the office required to be maintained in the State of its organization by the laws of that State or, if not so required, of the principal office of the foreign limited partnership; and

(7) if the certificate of limited partnership filed in the foreign limited partnership's state of organization is not required to include the names and business addresses of the partners, a list of the names and addresses.

§903. Issuance of Registration.—

(a) If the Secretary of State finds that an application for registration conforms to law and all requisite fees have been paid, he shall:

(1) endorse on the application the word "Filed", and the month, day and year of the filing thereof;

(2) file in his office a duplicate original of the application; and

(3) issue a certificate of registration to transact business in this State.

(b) The certificate of registration, together with a duplicate original of the application, shall be returned to the person who filed the application or his representative.

§904. Name.—A foreign limited partnership may register with the Secretary of State under any name (whether or not it is the name under which it is registered in its state of organization) that includes without abbreviation the words "limited partnership" and that could be registered by a domestic limited partnership.

§905. Changes and Amendments.—If any statement in the application for registration of a foreign limited partnership was false when made or any arrangements or other facts described have changed, making the application inaccurate in any respect, the foreign limited partnership shall promptly file in the office of the Secretary of State a certificate, signed and sworn to by a general partner, correcting such statement.

§906. Cancellation of Registration.—A foreign limited partnership may cancel its registration by filing with the Secretary of State a certificate of cancellation signed and

sworn to by a general partner. A cancellation does not terminate the authority of the Secretary of State to accept service of process on the foreign limited partnership with respect to [claims for relief] [causes of action] arising out of the transactions of business in this State.

§907. Transaction of Business Without Registration.—

(a) A foreign limited partnership transacting business in this State may not maintain any action, suit, or proceeding in any court of this State until it has registered in this State.

(b) The failure of a foreign limited partnership to register in this State does not impair the validity of any contract or act of the foreign limited partnership or prevent the foreign limited partnership from defending any action, suit, or proceeding in any court of this State.

(c) A limited partner of a foreign limited partnership is not liable as a general partner of the foreign limited partnership solely by reason of having transacted business in this State without registration.

(d) A foreign limited partnership, by transacting business in this State without registration, appoints the Secretary of State without registration, appoints the Secretary of State as its agent for service of process with respect to [claims for relief] [causes of action] arising out of the transaction of business in this State.

§908. Action by [Appropriate Official.]—The [appropriate official] may bring an action to restrain a foreign limited partnership from transacting business in this State in violation of this Article.

The above Article 9 entitled "Foreign Limited Partnerships" has been substantially enacted in Alabama, Arkan-

sas, Mississippi, New Mexico, Oklahoma, and Wyoming, as stated below

Part B. Excerpts from State Statutes and Rules Explicitly Applicable to Suits Against Foreign Limited Partnerships

1. ALABAMA CODE OF 1975, 1979 Suppl., §10-9-140 to §10-9-143, substantially enacted the Uniform Act provision on "Foreign Limited Partnerships," except for §907(d).

2. ARKANSAS ACTS 1979, Act 588, substantially enacted the Uniform Act provision on "Foreign Limited Partnerships."

3. CALIFORNIA CODE OF CIVIL PROCEDURES, §15700:

Chapter 3
PROCESS AGENTS FOR CERTAIN FOREIGN PARTNERSHIPS

Sec.
15700. Designation of agent; service of process.

§ 15700. Designation of agent; service of process

Every partnership, other than a commercial or banking partnership established and transacting business in a place without the United States, which is domiciled without this state and has no regular place of business within this state, shall, within 40 days from the time it commences to do business in this state, file a statement in the office of the Secretary of State in accordance with Section 24003 designating some natural person or corporation as the agent of the partnership upon whom process issued by authority of or under any law of this state directed against the partnership may be served. A copy of such designa-

tion, duly certified by the Secretary of State, is sufficient evidence of such appointment.

Such process may be served in the manner provided in subdivision (e) of Section 24003 on the person so designated, or, in the event that no such person has been designated, or if the agent designated for the service of process is a natural person and cannot be found with due diligence at the address stated in the designation, or if such agent is a corporation and no person can be found with due diligence to whom the delivery authorized by subdivision (e) of Section 24003 may be made for the purpose of delivery to such corporate agent, or if the agent designated is no longer authorized to act, then service may be made by personal delivery to the Secretary of State, Assistant Secretary of State or a Deputy Secretary of State of the process, together with a written statement signed by the party to the action seeking such service, or by his attorney, setting forth the last-known address of the partnership and a service fee of five dollars ($5). The Secretary of State shall forthwith give notice of such service to the partnership by forwarding the process to it by registered mail, return receipt requested, at the address given in the written statement.

Service on the person designated, or personal delivery of the process and statement of address together with a service fee of five dollars ($5) to the Secretary of State, Assistant Secretary of State or a Deputy Secretary of State, pursuant to this section is a valid service on the partnership. The partnership so served shall appear within 30 days after service on the person designated or within 30 days after delivery of the process to the Secretary of State, Assistant Secretary of State or a Deputy Secretary of State.

4. CONNECTICUT GENERAL STATUTES (Rev. to 1975) §52-59b

§ 52-59b. Jurisdiction of courts over nonresidents and foreign partnerships. Service of process

(a) As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident individual, or foreign partnership, or his or its executor or administrator, who in person or through an agent: (1) Transacts any business within the state; or (2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from such act; or (3) commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from such act, if he (A) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (B) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or (4) owns, uses or posseses any real property situated within the state.

(b) Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

(c) Any nonresident individual, or foreign partnership, or his or its executor or administrator, over whom a court may exercise personal jurisdiction, as provided in subsection (a), shall be deemed to have appointed the secretary of the state as its attorney and to have agreed that any process in any civil action brought against such nonresident

individual or foreign partnership, or his or its executor or administrator, may be served upon said secretary and shall have the same validity as if served upon such nonresident individual or foreign partnership personally. Such process shall be served by the officer to whom the same is directed upon said secretary by leaving with or at the office of said secretary, at least twelve days before the return day of such process, a true and attested copy thereof, and by sending to the defendant, by registered or certified mail, postage prepaid, a like true and attested copy with an endorsement thereon of the service upon said secretary addressed to such defendant at his last-known address. The officer serving such process upon said secretary shall leave with said secretary, at the time of service, a fee of five dollars, which fee shall be taxed in favor of the plaintiff in his costs if he prevails in any such action. The secretary of the state shall keep a record of each such process and the day and hour of service.
(1969, P.A. 744, §§ 1, 2; 1971, P.A. 213, § 1, May 21, 1971.)

5. FLORIDA STATUTES, §§ 620.40 *et seq.* and § 48.181

PART II. FOREIGN LIMITED PARTNERSHIPS

620.40 Foreign limited partnerships; definition

For the purpose of part II of this chapter a "foreign limited partnership" is defined to be a partnership formed by two or more persons under the laws of any other state or territory or of any other country having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

620.41 Permit required

(1) No foreign limited partnership shall transact business or acquire, hold or dispose of property in this state until it shall have filed with the Department of State a duly authenticated copy of its certificate and shall have received from it a permit to transact business in this state.

(2) Any foreign limited partnership which shall violate the provisions of part II of this chapter shall render itself and its partners, both limited and general, severally liable to the penalties and fines prescribed by part II of this chapter.

* * *

620.47 Validity of contracts of partnership unaffected by noncompliance

The failure of any foreign limited partnership to comply with the provisions of part II of this chapter, shall not affect the validity of any contract with such foreign limited partnership, but no action shall be maintained or recovery had in any of the courts of this state by any such partnership or its successors or assigns so long as such foreign limited partnership fails to comply with the provisions of part II of this chapter.

620.48 Penalty for violations

The members of any foreign limited partnership, whether general or special partners, who shall violate the provisions of this part prescribing the terms and conditions upon which foreign limited partnerships for profit may transact business or acquire, hold, or dispose of property in this state shall be held liable for the debts of the limited partnership as general partners.

620.49 Service of process

Service of process may be had on any general partner found in Florida and shall be valid as if served on each individual member of the partnership. In the event no general partner can be found in Florida, service of process may be effected by service upon the Department of State as agent of said limited partnership as provided for in § 48.181.

48.181 Service on nonresident engaging in business in state

(1) The acceptance by any person or persons, individually, or associated together as a copartnership or any other form or type of association, who are residents of any other state or country, and all foreign corporations, and any person who is a resident of the state and who subsequently becomes a nonresident of the state or conceals his whereabouts, of the privilege extended by law to nonresidents and others to operate, conduct, engage in, or carry on a business or business venture in the state, or to have an office or agency in the state, constitutes an appointment by the persons and foreign corporations of the secretary of state of the state as their agent on whom all process in any action or proceeding against them, or any of them, arising out of any transaction or operation connected with or incidental to the business or business venture may be served. The acceptance of the privilege is signification of the agreement of the persons and foreign corporations that the process against them which is so served is of the same validity as if served personally on the persons or foreign corporations.

(2) If a foreign corporation has a resident agent or officer in the state, process shall be served on the resident agent or officer.

(3) Any person, firm or corporation which sells, consigns, or leases by any means whatsoever tangible or intangible personal property, through brokers, jobbers, wholesalers, or distributors to any person, firm, or corporation in this state shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business venture in this state.

6. HAWAII REVISED STATUTES, §§ 425-71, 425-76

PART III. FOREIGN LIMITED PARTNERSHIPS

[§425-71] Registration and annual statements. Every limited partnership formed under the laws of any other territory, possession or state of the United States or of any foreign state or country which undertakes to do or carry on business in the State, shall file in the office of the director of regulatory agencies a registration statement within thirty days after it commences to do business in the State.
* * *

* * *

[§425-76] Personal liability and penalty. (a) If any general partner neglects or fails to comply with any provision of this part, all general partners shall be liable jointly and severally for all debts and liabilities of the limited partnership, and may be severally sued therefor without the necessity of joining the other members in any action or suit, and shall also severally forfeit to the State $25 for each and every month while a default shall continue, to be recovered by action brought in the name of the State by the director of regulatory agencies; provided that as to the forfeiture penalty, the director may, for good cause shown, reduce or waive the same.

(b) Any person who signs and acknowledges or certifies as correct any statement or certificate filed pursuant to this part, knowing the same to be false in any material particular, shall be fined not more than $5,000.

(c) Any person who negligently but without intent to defraud signs and acknowledges or certifies as correct any statement or certificate filed pursuant to this part, which statement or certificate is false in any material particular, shall be punished by a fine not exceeding $500. [L 1969, c 240, pt of §5]

7. KENTUCKY REVISED STATUTES, § 362.05

362.095. Foreign limited partnership — Requirements for doing business in state. — (1) A foreign limited partnership may be authorized to do business in this state when, and only when, it has:

(a) Filed a certified copy of its articles of partnership and all existing amendments in the office of the secretary of state, which may omit signature pages other than those signed by a general partner. It shall thereafter file a certified copy of subsequent amendments to its articles in the office of the secretary of state, provided that no amendment indicating merely a change in limited partners need be filed. A limited partnership shall pay to the secretary of state an original filing fee of twenty-five dollars ($25.00) and a recording fee of ten dollars ($10.00) for recording the articles of partnership and accompanying amendments, and shall pay the same recording fee for recording subsequent amendments; and

(b) Designating a process agent, which shall have the same legal effect and be subject to the same requirements as a process agent for a foreign corporation under KRS 271A.555.

(2) A limited partnership registering to do business in this state under subsection (1) of this section shall not be required to list the names of each limited partner. (Enact. Acts 1972, ch. 319, § 1; 1978, ch. 384, § 102, effective June 17, 1978.)

8. MAINE REVISED STATUTES, § 5

§ 181. Limited partnerships of other states

1. Qualification. Any limited partnership heretofore or hereafter formed in accordance with the laws of another state shall be treated as having all of the attributes accorded by the laws of such other state, excepting the right to exercise any powers not exercisable by resident limited partnerships, and shall be qualified to transact business within this State, only after it shall have filed with the Secretary of State an attested copy of its current certificate of limited partnership as amended and filed in the state of its formation, together with a statement on forms prescribed or furnished by the Secretary of State signed and sworn to by a general partner setting forth its business address within this State and the name and address of an individual resident of this State upon whom process against such limited partnership may be served. The filing fee for such certified copy and statement shall be $10.

* * *

9. MASSACHUSETTS GENERAL LAWS, c. 227, § 5

§ 5. Agents for service of process; duty to appoint by certain individuals; penalty

Every individual not an inhabitant of the commonwealth and every partnership composed of persons

not such inhabitants, having a usual place of business in the commonwealth, temporarily or permanently, or engaged here, temporarily or permanently, and with or without a usual place of business here, in the construction, erection, alteration or repair of a building, bridge, railroad, railway, or structure of any kind, shall, before doing business in the commonwealth, appoint in writing a person who is a citizen and resident thereof to be his or its true and lawful attorney upon whom all lawful processes against such individual or partnership may be served with like effect as if served on such person or partnership; and said writing or power of attorney shall contain an agreement on the part of the maker that the service of any lawful process on said attorney shall be of the same force and validity as service on such individual or partnership. The power of attorney shall be filed in the office of the state secretary, and copies certified by him shall be taken as sufficient evidence thereof. Such agency shall be continued so long as such individual or partnership does business as aforesaid in the commonwealth, and the power of attorney shall not be revoked until a similar power is given to another citizen and resident of the commonwealth and filed as aforesaid. If such individual or partnership fails to appoint an agent and does business in this commonwealth, service of process, in duplicate, may be made upon the state secretary. The secretary shall, upon a payment of a fee of five dollars by the plaintiff, give notice to the defendant of said action by mailing by registered mail, return receipt requested, a copy of the legal process to the defendant's last known address which shall be furnished to the secretary by the plaintiff or his attorney. As amended St.1958, c. 444.

10. MICHIGAN, COMPILED LAWS ANNOTATED, Vol. 32, §§ 600.721, 600.725

600.721 Partnerships; general personal jurisdiction

Sec. 721. The existence of any of the following relationships between a partnership or limited partnership and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise general personal jurisdiction over such partnership or limited partnership and to enable such courts to render personal judgments against such partnership or limited partnership.

(1) Formation under the laws of this state.

(2) Consent, to the extent authorized by the consent.

(3) The carrying on of a continuous and systematic part of its general business within the state. P.A.1961, No. 236, § 721, Eff. Jan. 1, 1963.

600.725 Same; limited personal jurisdiction

Section 725. The existence of any of the following relationships between a partnership or limited partnership or an agent thereof and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such partnership or limited partnership and to enable such courts to render personal judgments against such partnership or limited partnership arising out of the act or acts which create any of the following relationships:

(1) The transaction of any business within the state.

(2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.

(3) The ownership, use, or possession of any real or tangible personal property situated within the state.

(4) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(5) Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant. P.A.1961, No. 236, § 725, Eff. Jan. 1, 1963.

11. MISSISSIPPI LAWS 1979, c. 420, pp. 737-39, substantially enacted the Uniform Act provision on "Foreign Limited Partnerships."

12. MONTANA RULES OF CIVIL PROCEDURE

Rule 4D(2)

(2) Personal Service Within the State. The summons and complaint shall be served together, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

* * *

(f) Upon a foreign corporation, partnership or other unincorporated association, established by the laws of any other state or country, and having a place of business within this state or doing business herein either permanently or temporarily, or which was doing business herein either permanently, or temporarily at the time the cause of action accrued, (i) by delivering a copy of the summons and complaint to an officer, director, superintendent or managing or general agent, or partner,

or associate, or attorney for such corporation, partnership, or association; or by leaving such copies at the office or place of business of the corporation, partnership, or association within the state with the person in charge of such office; or (ii) by delivering a copy of the summons and complaint to any agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, partnership, or association, provided that if the agent or attorney in fact is one designated by statute to receive service, such further notice as the statute requires shall also be given; or (iii) if the charter of the foreign corporation, or its right to do business, has expired or been forfeited, by delivering a copy of the summons and complaint to one of the persons who have become trustees for the corporation and its stockholders or members, if such can be found in Montana.

13. NEBRASKA REVISED STATUTES, § 25-314

25-314. Partnership or unincorporated association; labor unions; process; service on Secretary of State, when authorized; execution on judgment; change of agent, address; fees. Process against any such company, firm, or unincorporated association which has its principal place of business or activity in the state shall be served by a copy left at its usual place of doing business or conducting activities within the county with one of the members of such company, firm, or unincorporated association or with a clerk or general agent thereof or by serving a copy of such process on the Secretary of State as hereinafter provided. When such company, firm, or unincorporated organization has its principal place of business or activity outside of this state and does not have a usual place of doing business or activity within the state, nor a clerk or general agent within

the state, such company, firm, or unincorporated association shall appoint an agent or agents in this state and before it is authorized to engage in any kind of business or activity in this state such company, firm, or unincorporated organization shall file in the office of the Secretary of State a certified statement setting forth that such company, firm, or unincorporated organization shall file in the office of the Secretary of State a certified statement setting forth that such company, firm, or unincorporated organization is doing business or conducting activities in the State of Nebraska stating the nature of the business or activity, and designating an agent or agents within the State of Nebraska, upon whom process, or other legal notice of the commencement of any legal proceeding, or in the prosecution thereof may be served; and such service of process or any such other legal notice as provided in this section made upon the Secretary of State, or upon any such agent or agents, shall constitute valid service upon such company, firm, or unincorporated organization in all courts of this state, in counties where the cause of action or some part thereof arose and the doing of business or conducting activities within the State of Nebraska without filing such certified statement and designation of agent or agents shall be deemed an appointment by such company, firm, or unincorporated association of the Secretary of State as its true and lawful attorney upon whom may be served all legal process in any action or proceeding against it growing out of such business or activities.

* * *

14. NEVADA RULES OF CIVIL PROCEDURE, Rule 4(d), pp. 1188-89

Rule 4(d)

(d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made by delivering a copy of the summons attached to a copy of the complaint as follows:

(2) If the suit is against a foreign corporation, or a nonresident partnership, joint-stock company or association, doing business and having a managing or business agent, cashier, or secretary within this state; to such agent, cashier, or secretary or to an agent designated for service of process as required by law; or in the event no such agent is designated, to the secretary of state or the deputy secretary of state, as provided by law.

[As amended; effective March 16, 1964.]

15. NEW HAMPSHIRE REVISED STATUTES ANNOTATED, c. 305-A

305-A:1 Registration. Every foreign partnership desiring to do business within this state, shall pay a registration fee of fifty dollars and an annual maintenance fee of twenty-five dollars to the secretary of state on the first business day of April following the date of registration and on the first business day of April thereafter and continuously maintain in this state: (a) a registered office which may or may not be the same as its place of business in the state; and (b) a registered agent, which agent may be the secretary of state and its[1] successor or successors in office, or an individual resident in or a corporation authorized to do business may act as such agent in this state; and

(c) the secretary of state shall in December of each year notify all partnerships registered hereunder of the fees to become due hereunder on the first business day of April following; and shall in April notify all partnerships who may have failed to pay the fees required hereunder.

* * *

305-A:3 Noncompliance; Penalty. Any such partnership which refuses to comply with the requirements of this chapter may be restrained from further prosecution of business in this state by proceedings in equity brought by the attorney general in the county of Merrimack and shall be fined not more than five hundred dollars.

305-A:4 Effect. Failure to comply with the registration provisions of this chapter shall not affect the validity of any contract with such partnership; but no action shall be maintained or recovery had in any of the courts of this state by any such foreign partnership so long as it fails to comply with the requirements of this chapter.

305-A:6 Service of Process—How Made. Service of process in any suit, action or proceeding or service of any notice or demand required or permitted by law to be served on a foreign partnership may be made on such partnership by service thereof on a registered agent of such partnership. Service of any such process or of any such notice or demand upon a registered agent as registered agent may be made: (a) by leaving an attested copy of such process, notice or demand in the registered office of the registered agent during regular business hours, or (b) whenever any foreign partnership authorized to transact or transacting business in this state shall fail to appoint or maintain in

this state a registered agent upon whom service of legal process or service of any such notice or demand may be had, or whenever service on any such registered agent cannot with reasonable diligence and providence be made as above provided, or whenever the certificate of authority of any foreign partnership shall be forfeited, then and in every such case the secretary of state shall be and hereby is irrevocably authorized as the agent and representative of such foreign partnership to accept service of any process or service of any notice or demand required or permitted by law to be served upon such partnership.

16. NEW MEXICO STATUTES ANNOTATED 1978, ch. 54, art. 3 substantially enacted the Uniform Act provision on "Foreign Limited Partnerships."

17. NEW YORK, McKINNEY'S CONSOLIDATED LAWS, BOOK 38, PARTNERSHIP LAW, ARTICLE 8-A-FOREIGN LIMITED PARTNERSHIPS [NEW, EFFECTIVE JAN. 1, 1980]

§ 120. Definitions

For the purpose of this article a foreign limited partnership is a partnership formed by two or more persons under the laws of any other state or territory or of any other country as having members one or more general partners and one or more limited partners and in which the limited partners as such are not bound by the obligations of the partnership.

§ 120-a. Certificate of authority required

1. No foreign limited partnership shall do business or acquire, hold or dispose of real property in this state until

it shall have received from the department of state a certificate of authority to do business in this state.

2. Without excluding other activities which may not constitute doing business in this state, a foreign limited partnership shall not be considered to be doing business in this state for the purposes of this article, by reason of carrying on in this state any one or more of the following activities:

(a) Maintaining or defending any action or proceeding, whether judicial, administrative, arbitrative or otherwise, or effecting settlement thereof or the settlement of claims or disputes.

(b) Holding meetings of its partners, general or limited.

(c) Maintaining bank accounts.

3. The specification in subdivision two of this section does not establish a standard for activities which may subject a foreign limited partnership to service of process under this article or any other statute of this state.

* * *

§ 120-h. Violations

1. The attorney general may bring an action to restrain a foreign limited partnership without a certificate of authority from doing any business in this state for which it is required to be authorized in this state, or from doing any business in this state the character of which is not set forth in its certificate or amendments to such certificate or from doing any business in this state which is prohibited under the laws of this state. The attorney general may bring an action or special proceeding to annul the authority of a foreign limited partnership doing any business in

this state, the character of which is not set forth in its certificate or amendments to such certificate, or where such partnership is doing any business in this state which is prohibited under the laws of this state. The attorney general shall deliver a certified copy of the order of annulment to the department of state. Upon the filing thereof by the department of state the certificate of authority of foreign limited partnership to do business in this state shall be annulled. The secretary of state shall continue as agent of the foreign limited partnership upon whom process against it may be served in any action or special proceeding based upon any liability or obligation incurred by the foreign limited partnership with the state prior to the filing of the certified copy of the order of annulment by the department of state.

2. Limited partners of a foreign limited partnership doing business in this state, or acquiring, holding, or disposing of real property in this state without having received from the department of state a certificate of authority pursuant to this article, or having otherwise violated this article shall nevertheless be entitled to limited liability in New York, to the same extent as is afforded in the state, territory, or country where the foreign limited partnership was created. In no event shall the liability to which such limited partners are subject be more limited than that of limited partners in a limited partnership organized under the laws of this state.

* * *

§ 120-l. Actions or special proceedings against foreign limited partnerships.

1. An action or special proceeding against a foreign limited partnership may be maintained by a resident of

this state or by a domestic limited partnership or domestic corporation of any type or kind for any cause of action.

2. Except as otherwise provided in this article, an action or special proceeding against a foreign limited partnership may be maintained by another foreign limited partnership or foreign corporation of any type or kind or by a nonresident in the following cases only:

(a) Where it is brought to recover damages for the breach of a contract made or to be performed within this state, or relating to property situated within this state at the time of the making of the contract.

(b) Where the subject matter of the litigation is situated within this state.

(c) Where the cause of action arose within this state, except where the object of the action or special proceeding is to affect the title of real property situated outside this state.

(d) Where, in any case not included in paragraphs (a), (b) and (c) of this subdivision, a nondomiciliary would be subject to the personal jurisdiction of the courts of this state under section three hundred two of the civil practice law and rules.

(e) Where the defendant is a foreign limited partnership doing business or authorized to do business in this state.

Added L.1979, c. 519, § 1.

18. NORTH CAROLINA GENERAL STATUTES, IA-1 SUBCHAPTER IIIA. JURISDICTION.

Article 6A.

Jurisdiction.

8 **1-75.1. Legislative intent.** — This article shall be liberally construed to the end that actions be speedily and finally determined on their merits. The rule that statutes in derogation of the common law must be strictly construed does not apply to this article. (1967, c. 954, s.2)

§ 1-75.2. Definitions. — In this article the following words have the designated meanings:

(1) "Person" means any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society which may sue or be sued under a common name.

* * *

§ 1-75.3. Jurisdictional requirements for judgments against persons, status and things. — (a) Jurisdiction of Subject Matter Not Affected by This Article. — Nothing in this article shall be construed to confer, enlarge or diminish the subject matter jurisdiction of any court.

(b) Personal Jurisdiction. -- A court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in § 1-75.4 or § 1-75.7 and in addition either:

(1) Personal service or substituted personal service of summons, or service of publication of a notice of service of process is made upon the defendant pursuant to Rule 4 (j) of the Rules of Civil Procedure; or

(2) Service of a summons is dispensed with under the conditions in § 1-75.7.

(c) Jurisdiction in Rem or Quasi in Rem. — A court of this State having jurisdiction of the subject matter may render a judgment in rem or quasi in rem upon a status or upon a property or other things pursuant to § 1-75.8 and the judgment in such action may affect the interests in the status, property or thing of all persons served pursuant to Rule 4 (k) of the Rules of Civil procedure. (1967, c.954, s.2.)

§ 1-75.4 Personal jurisdiction, grounds for generally. — A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:

(1) Local Presence or Status. — In any action, whether the claim arises within or without this State, in which a state claim is asserted against a party who when service of process is made upon such a party:

a. Is a natural person present within this State; or

b. Is a natural person domiciled within this State; or

c. Is a domestic corporation; or

d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

(2) Special Jurisdiction Statutes. — In any action which may be brought under statutes of this State that specifically confer grounds for personal jurisdiction.

(3) Local Act or Omission. — In any action claiming injury to a person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

(4) Local Injury; Foreign Act. — In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:

a. Solicitation or services activities were carried on within this State by or on behalf of the defendant; or

b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed within this State in the ordinary course of trade.

(5) Local Services, Goods or Contracts. — In any action which:

a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or

b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or

c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or

d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction; or

e. Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred.

* * *

19. OKLAHOMA STATUTES ANNOTATED Pocket Part (1979-80), §§ 172-180, substantially enacted the Uniform Act provision on "Foreign Limited Partnerships."

20. OREGON REVISED STATUTES, ch. 69

69.440 Foreign limited partnerships; reciprocity; election of name to be used in this state. (1) A foreign limited partnership that has filed a certificate of limited partnership in another state shall, by filing with the Corporation Commissioner a certified copy of such filing with such other state, accompanied by a filing fee of $25, enjoy the same rights and privileges as a limited partnership filed in this state, and shall enjoy the same rights and privileges and shall be subject to the same duties, restrictions,

penalties and liabilities imposed upon a limited partnership which has filed a certificate of limited partnership in this state.

(2) If the name of the foreign limited partnership does not meet the requirements of ORS 69.210, then the limited partnership may file a supplemental statement, signed by a general partner, of the name meeting such requirements that the partnership elects to use within this state. [1971 c.594 § 32; 1973 c.367 § 9]

69.450 Certification of agent for service of process by and service on foreign limited partnerships. (1) Each limited partnership which is domiciled without this state shall file a certificate in the office of the Corporation Commissioner in accordance with the ORS 69.440 and designate some natural person or corporation as agent of the partnership and the general partners upon whom any process, notice or demand which arises out of the conduct of the partnership affairs and which is required or permitted by law to be served on the limited partnership or any general parnter, may be served.

(2) Such process may be served as provided by ORCP 7 D.(3)(b) on the person designated pursuant to subsection (1) of this section or, in the event that no such person has been designated or the person designated cannot be found, then service may be made as provided by ORS 69.500. [1971 c.594 § 31; 1973 c.367 § 10; 1975 c.604 § 3; 1979 c.284 § 88]

69.480 Registered office and registered agent requirement. Each domestic limited partnership and each foreign limited partnership doing business in this state and all general partners of either of them shall have and continuously maintain in this state:

(1) A single registered office which may be, but need not be, the same as the limited partnership's place of business; and

(2) A single registered agent, which agent may be either an individual resident in this state whose business office is identical with such registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this state, having a business office identical to such registered office.
[1975 c.604 §5]

* * *

69.500 Duties of registered agent; Corporation Commissioner as agent in certain cases; restriction on defaults; court jurisdiction unaffected. (1) The registered agent shall be an agent of the limited partnership and the general partners thereof upon whom any process, notice or demand which arises out of the conduct of the partnership affairs and which is required or permitted by law to be served upon the limited partnership or any general partner thereof may be served.

(2) The Corporation Commissioner shall be an agent of the limited partnership and each general partner thereof upon whom any such process, notice or demand may be served:

(a) Whenever the limited partnership and its general partners fail to appoint or maintain a registered agent in this state, or

(b) Whenever the registered agent cannot with reasonable diligence be found at the registered office.

(3) Service shall be made on the Corporation Commissioner by:

(a) Service on the Corporation Commissioner or a clerk on duty in any office of the Corporation Commissioner of a copy of the process, notice or demand with any papers required by law to be delivered in connection with the service, and a $2 fee;

(b) Transmittal by the person initiating the proceedings by certified or registered mail, return receipt requested, of notice of the service on the Corporation Commissioner and a copy of the process, notice or demand and accompanying papers to the registered agent and the limited partnership at the last registered address of the registered agent and the limited partnership as shown by the records on file in the office of the Corporation Commissioner and to all general partners being served at the last-known address of such general partner as shown by the records on file in the office of the Corporation Commissioner; and

(c) Filing with the appropriate court or other body, as part of the return of service, of the return receipt of mailing and an affidavit of the person initiating the proceedings that this section has been complied with.

(4) No default shall be entered against any defendant served under subsection (3) of this section who has not either received or rejected a registered or certified letter containing the notice of such service and a copy of the process, notice or demand and accompanying papers, unless the plaintiff can show that the defendant, after due diligence, cannot be found within or without the state and that fact appears by affidavit to the satisfaction of the court or judge thereof. Due diligence is satisfied when it appears from such affidavit that the defendant cannot be found at the most recent address given by the defendant to the Corporation Commissioner under this chapter, if it appears from the affidavit that inquiry at such address was made within a reasonable time preceding service on the

Corporation Commissioner. Where due diligence is proved to the court by such affidavit, the service upon the Corporation Commissioner shall be sufficient valid personal service upon such defendant notwithstanding that the defendant did not actually receive a notice of such service because of the defendant's failure to notify the Corporation Commissioner of a change in address as required by this chapter.

(5) The Corporation Commissioner shall keep a record of all processes, notices and demand served upon the commissioner under this section.

(6) Nothing contained in this section shall limit or affect the jurisdiction of the courts of this state now or hereafter conferred by law; shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served on a limited partnership or the general partners thereof in any other manner now or hereafter permitted by law; or shall enlarge the purposes for which service on the Corporation Commissioner is permitted where such purposes are limited by any other provision of law. [1975 c.604 §7; 1979 c.284 §89]

21. RHODE ISLAND GENERAL LAWS, vol. 2A

9-5-29. Appointment of attorney by nonresidents doing business in state.—Every individual not a resident of this state and every partnership composed of persons not such residents, having a usual place of business in this state, temporarily or permanently, or engaged here, temporarily or permanently, and with or without a usual place of business here, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind, shall, before carrying on business in this

state, file in the office of the secretary of state a written power appointing some competent person resident in this state as his or its attorney with authority to accept service of process against such individual or partnership in this state, containing an agreement on the part of the maker that the service of any lawful process in this state on such attorney shall be of the same force and validity as service on such individual or partnership and providing that, in case of garnishment when the fees therefor shall have been paid or tendered, such attorney may make the affidavit required by law in such cases.

22. TEXAS VERNONS STATUTES, Art. 6132(a), § 32, added in 1977, amended, 1979.

Qualification of foreign limited partnerships

Sec. 32. (a) Definition. "Foreign limited partnership" in this Act means a partnership formed under the limited partnership laws of any territory, possession, commonwealth, or state of the United States other than this state, having as members one or more general partners and one or more limited partners.

(b) Qualification. A foreign limited partnership may qualify to transact business in Texas by

(1) filing with the Secretary of State a copy of its certificate of limited partnership (or equivalent document) and all amendments thereto, with an original certification by the proper filing officer of the jurisdiction of its formation;

(2) filing with the Secretary of State a qualification statement containing:

(A) the name of the limited partnership, the jurisdiction

of its formation, and the address of its principal place of business;

(B) the name and address of at least one of its general partners, who gives consent under Paragraph (C);

(C) a consent by the limited partnership and the named general partner(s) to be served with process in Texas through their registered agent in any proceeding for the enforcement of an obligation of the limited partnership;

(D) the address of the limited partnership's registered office in Texas;

(E) the name of the registered agent (either an individual or a corporation having as one of its purposes acting as a registered agent) for the limited partnership and for the named general partner(s) in Texas at such address; and

(F) the signature of the limited partnership and of the named general partner(s);

(3) paying a filing fee of one-half of one percent of the total contributions (including agreed additional contributions) of the limited partners stated in the copy of the certificate of limited partnership so filed, but not less than $100 nor more than $2500.

(c) Effect of Qualification. On qualifying under Section 32(b) of this Act, a foreign limited partnership shall enjoy the same rights and privileges, and shall be subject to the same duties, restrictions, and liabilities, as a limited partnership formed under this Act, but its internal affairs and the liabilities of its limited partners shall be governed by the laws of the jurisdiction of its formation.

* * *

(j) Service of Process. (1) The registered agent designated under Section 32(b) of this Act by a foreign

limited partnership and a general partner(s) named in its qualification statement shall be an agent of the foreign limited partnership and such general partner(s) upon whom any process, notice, or demand required or permitted by law to be served upon the foreign limited partnership and/or such general partner(s) may be served.

(2) Nothing herein shall limit or affect the right to serve any process, notice, or demand under Chapter 43, Acts of the 56th Legislature, Regular Session, 1959 (Articles 2031b and 2033, Vernon's Texas Civil Statutes), or in any other manner now or hereafter permitted by law.

23. WEST VIRGINIA CODE, § 647-9-26a.

§ 47-9-26a. Secretary of state constituted attorney-in-fact for all limited partnerships; manner of acceptance or service of notices and process upon secretary of state; what constitutes conducting affairs or doing or transacting business in this State for purposes of this section.

The secretary of state is hereby constituted the attorney-in-fact for and on behalf of every limited partnership created by virtue of the laws of this State and every foreign limited partnership authorized to conduct affairs or do or transact business herein pursuant to the provisions of this article, with authority to accept service of notice and process on behalf of every such limited partnership and upon whom service of notice and process may be made in this State for and upon every such limited partnership. No act of such limited partnership appointing the secretary of state such attorney-in-fact shall be necessary. Immediately after being served with or accepting any such process or notice, of which process or notice two copies for each

defendant shall be furnished the secretary of state with the original notice or process, together with a fee of two dollars, the secretary of state shall file in his office a copy of such process or notice, with a note thereon endorsed of the time of service, or acceptance, as the case may be, and transmit one copy of such process or notice by registered or certified mail, return receipt requested, to the person to whom notice and process shall be sent, whose name and address were last furnished to the state officer at the time authorized by statute to accept service of notice and process and upon whom notice and process may be served; and if no such person has been named, to the principal office of the limited partnership at the address last furnished to the state officer at the time authorized by statute to accept service of process and upon whom process may be served, as required by law. No process or notice shall be served on the secretary of state or accepted by him less than ten days before the return day thereof. Such limited partnership shall pay the annual fee prescribed by article twelve [§ 11-12-1 et seq.], chapter eleven of this Code for the services of the secretary of state as its attorney-in-fact.

Any foreign limited partnership which shall conduct affairs or do or transact business in this State without having been authorized so to do pursuant to the provisions of this article shall be conclusively presumed to have appointed the secretary of state as its attorney-in-fact with authority to accept service of notice and process on behalf of such limited partnership and upon whom service of notice and process may be made in this State for and upon every such limited partnership in any action or proceeding described in the next following paragraph of this section. No act of such limited partnership appointing the secretary of state as such attorney-in-fact shall be necessary. Immediately after being served with or accepting any such process or

notice, of which process or notice two copies for each defendant shall be furnished the secretary of state with the original notice or process, together with a fee of two dollars, the secretary of state shall file in his office a copy of such process or notice, with a note thereon endorsed of the time of service or acceptance, as the case may be, and transmit one copy of such process or notice by registered or certified mail, return receipt requested, to such limited partnership at the address of its principal office, which address shall be stated in such process or notice. Such service or acceptance of such process or notice shall be sufficient if such return receipt shall be signed by an agent or employee of such limited partnership, or the registered or certified mail so sent by the secretary of state is refused by the addressee and the registered or certified mail is returned to the secretary of state, or to his office, showing thereon the stamp of the United States postal service that delivery thereof has been refused, and such return receipt or registered or certified mail is appended to the original process or notice and filed therewith in the clerk's office of the court from which such process or notice was issued. No process or notice shall be served on the secretary of state or accepted by him less than ten days before the return date thereof. The court may order such continuances as may be reasonable to afford each defendant opportunity to defend the action or proceedings.

For the purpose of this section, a foreign limited partnership not authorized to conduct affairs or do or transact business in this State pursuant to the provisions of this article shall nevertheless be deemed to be conducting affairs or doing or transacting business herein (a) if such limited partnership makes a contract to be performed, in whole or in part, by any party thereto, in this State, (b) if such limited partnership commits a tort in whole or in part in

this State, or (c) if such limited partnership manufactures, sells, offers for sale or supplies any product within this State notwithstanding the fact that such limited partnership had no agents, servants or employees or contacts within this State at the time of said injury. The making of such contract, the committing of such tort or the manufacture or sale, offer of sale or supply of such defective product as hereinabove described shall be deemed to be the agreement of such limited partnership that any notice or process served upon, or accepted by, the secretary of state pursuant to the next preceding paragraph of this section in any action or proceeding against such limited partnership arising from, or growing out of, such contract, tort, or manufacture or sale, offer of sale or supply of such defective product shall be of the same legal force and validity as process duly served on such limited partnership in this State. (1978, c.92.)

24. WISCONSIN STATUTES, § 801.11(6) and § 801.05(1) to § 801.11

(6) Partners and partnerships. A summons shall be served individually upon each general partner known to the plaintiff by service in any manner prescribed in sub. (1), (2) or (5) where the claim sued upon arises out of or relates to partnership activities within this state sufficient to subject a defendant to personal jurisdiction under s. 801.05(2) to (10). A judgment rendered under such circumstances is a binding adjudication individually against each partner so served and is a binding adjudication against the partnership as to its assets anywhere.

801.5 Personal jurisdiction, grounds for generally

A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action

pursuant to s. 801.11 under any of the following circumstances:

(1) Local presence or status. In any action whether arising within or without this state, against a defendant who when the action is commenced:

(a) Is a natural person present within this state when served; or

(b) Is a natural person domiciled within this state; or

(c) Is a domestic corporation; or

(d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

(2) Special jurisdiction statutes. In any action which may be brought under statutes of this state that specifically confer grounds for personal jurisdiction over the defendant.

(3) Local act or omission. In any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.

(4) Local injury; foreign act. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

(a) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or

(b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

(5) Local services, goods or contracts. In any action which:

(a) Arises out of a promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff; or

(b) Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant; or

(c) Arises out of a promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship from this state goods, documents of title, or other things of value; or

(d) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on the defendant's order or direction; or

(e) Relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred.

(6) Local property. In any action which arises out of:

(a) A promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this state; or

(b) A claim to recover any benefit derived by the defendant through the use, ownership, control or possession by

the defendant of tangible property situated within this state either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

(c) A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this state at the time the defendant acquired possession or control over it.

(7) Deficiency judgment on local foreclosure or resale. In any action to recover a deficiency judgment upon a mortgage note or conditional sales contract or other security agreement executed by the defendant or predecessor to whose obligation the defendant has succeeded and the deficiency is claimed either:

(a) In an action in this state to foreclose upon real property situated in this state; or

(b) Following sale of real property in this state by the plaintiff under ch. 846; or

(c) Following sale of real property in this state by the plaintiff under ch. 409.

(8) Director or officer of a domestic corporation. In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer.

[Omitted are paras. on taxes (9)
and insurance (10)]

25. WYOMING STATUTES ANNOTATED, 1979 Com. Suppl., pp. 61-63, substantially enacted the Uniform Act provision on "Foreign Limited Partnerships."

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD J. HYNNING,
Appellant,

v.

DUFIEF MORTGAGE, INC., *et. al.*,
Appellees,

On Appeal from the Supreme Court of Virginia

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Whether *res judicata* and collateral estoppel preclude Appellant Hynning from bringing this appeal based on the issue of *in personam* jurisdiction over the partnership, when that issue has been decided adversely to Appellant Hynning in a prior case, between the same parties or their privies, that was before this Court on a Petition for Writ of Certiorari (denied March 20, 1978, Case No. 77-1044).

2. Assuming that Appellant Hynning is correct in his analysis that the issue is now one of subject matter jurisdiction, does the doctrine of *res judicata* and collateral estoppel preclude Appellant Hynning from bringing this appeal when that issue was tacitly, if not explicitly, determined in the first case and was determined adversely to Appellant Hynning by a Court with jurisdiction over the defendant and therefore the power to decide whether it had jurisdiction over the subject matter.

3. Whether the judgment below rests on an adequate non-federal basis, the doctrine of *res judicata* and collateral estoppel.

4. Whether the Virginia Statute allowing service of process on one partner to give the Court jurisdiction of the partnership is Constitutional under Section I of the Fourteenth Amendment to the Constitution of the United States.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-32

CLIFFORD J. HYNNING,
Appellant,

v.

DUFIEF MORTGAGE, INC., *et. al.*,
Appellees,

On Appeal from the Supreme Court of Virginia

MOTION TO DISMISS

Appellee, Dufief Mortgage, Inc., pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss this appeal on the following grounds:

1. That the Appellant is precluded from bringing this appeal by the doctrine of *res judicata* and collateral estoppel;

2. That the judgment below rests on an adequate non-federal basis;

3. That the question is so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

The Supreme Court of Virginia is clearly correct in denying the Appellant's Petition for Appeal. This cause rests on a Creditor's bill filed by the Appellee, Dufief Mortgage, Inc. (hereinafter Dufief) in the Circuit Court of Arlington County in Chancery No. 28334 to enforce an earlier judgment of that Court on a debt of Appellant, Clifford Hynning (hereinafter Hynning). The Arlington Circuit Court by opinion on March 27, 1979, ruled in favor of Dufief and held that Hynning was barred from raising the issue of the validity of the original judgment by the doctrine of *res judicata* and collateral estoppel. The Court held that the issue of jurisdiction had been determined in the original case and could not be raised again in this action. Hynning's Petition for Appeal in this case was denied by the Supreme Court of Virginia on April 10, 1980.

The Creditor's bill is based on a judgment entered January 14, 1977, by the Circuit Court of Arlington County, Virginia, in a case styled *Bogley, Harting, Mahoney & Lebling, Inc., A Maryland Corporation v. the Caravel Office Building Company, A District of Columbia Partnership, et. als.*, at Law No. 18633, against the defendant partnership and one of the partners, Hynning. Bogley, Harting, Mahoney & Lebling, Inc. is now known as Dufief Mortgage, Inc. In that suit, *Bogley* brought action on a delinquent partnership promissory note and obtained judgment thereon. The District of Columbia partnership had conducted no business in the State of Virginia and service of process was obtained on both the partnership and Hynning at the personal residence of Hynning in Arlington County pursuant to Section 8-59.1, Code of Virginia (1950) as amended.

Hynning's Petition for Appeal to the Supreme Court of Virginia was denied by memorandum judgment on October 25, 1977. This Court denied Hynning's Petition for Writ of Certiorari on March 20, 1978. (*Caravel Office Building Company and Clifford J. Hynning v. Bogley, Harting, Mahoney & Lebling, Inc., Case No. 77-1044*). The Creditor's bill, which is the subject of this appeal, seeks to enforce that earlier judgment by sale of Hynning's personal residence.

ARGUMENT

1. *Res Judicata* and collateral estoppel apply to preclude Appellant Hynning from bringing this appeal based on the issue of lack of *in personam* jurisdiction when that issue has been decided adversely to Appellant Hynning in a prior case.

Hynning's argument throughout these two proceedings has been that the Arlington County Circuit Court lacked jurisdiction over the District of Columbia partnership and thus the judgment in the original case is void. He made that argument in the first case and lost in the Arlington Circuit Court, the Virginia Supreme Court and his Petition for Writ of Certiorari to this Court was denied. Now he is making the same argument again in this case except that he is now saying that the original Court lacked subject matter jurisdiction, and that that issue was not litigated in the prior case. It is Dufief's contention that the exact same issue was presented in the *Bogley v. Hynning* case and decided adversely to Hynning. That is the position taken by the Arlington Circuit Court in its opinion of March 27, 1979 holding that Hynning was barred from raising this issue again. In that opinion, the Court held that "a careful reading of the able arguments presented in the prior case indicates that while the issue of subject matter jurisdiction

was not phrased in that precise term, the concepts asserted were identical." The first question presented by Hynning in the prior case is his Petition for Writ of Certiorari filed with this Court was:

> "1. Is the due process clause of the 14th Amendment to the Constitution of the United States violated if a forum state, without consent,
>
> a. exercised jurisdiction over a non-resident limited partnership without even any "minimal contacts" with the forum state?
>
> b. serves process on a non-resident partnership, without even any "minimal contacts" with the forum state at the personal residence (non-business) of one of the partners in the forum state?"

Hynning's present argument, that Virginia's statute authorizing service of process on a partnership is unconstitutional as a violation of due process is the exact same argument he made in the first case and Appellee contends he is barred by the doctrine of *res judicata* and collateral estoppel from raising it in this case even if he now labels the issue "subject matter jurisdiction and not *in personam* jurisdiction." It should be noted that Bogley is in privity with Dufief in the prior case.

This Court has defined subject matter jurisdiction as follows: "by jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the Court, and is to be sought for in the general nature of its powers, or in authority specially conferred." *Cooper v. Reynolds*, 77 U.S. 308 (1870). The subject matter of the *Bogley v. Hynning* case was the debt owed by Hynning to Bogley; Hynning's personal obligation for the debt of his partnership. The Arlington Circuit Court is a

Court of general jurisdiction and is authorized to try cases concerned with the debt of a defendant residing within the Court's territorial jurisdiction. When Hynning now talks about Virginia's Service of Process statute on partnerships and concepts such as "minimum contacts" he is in reality talking about personal jurisdiction; the same issue that was litigated and decided adversely to Hynning in the prior case.

The doctrine of *res judicata* and collateral estoppel is that when parties have once litigated an issue it is concluded. The principles of *res judicata* and collateral estoppel apply to questions of jurisdiction as well as to other issues. (*American Surety Co. v. Baldwin* (1932), 287 U.S. 156, 166.) In the interest of finality, the concept of setting aside a judgment on voidness grounds is narrowly restricted. (7 *Moore's Federal Practice,* 60.25 [2] (2nd ed., 1978)). It is Dufief's contention that the doctrine of *res judicata* and collateral estoppel should apply to bar Hynning from once again litigating the issue of the Arlington Court's jurisdiction over the partnership.

2. Assuming that Appellant Hynning is correct in his analysis that the issue is now one of subject matter jurisdiction, *res judicata* and collateral estoppel apply to preclude Appellant Hynning from bringing this appeal when that issue was tacitly, if not explicitly, determined in the first instance, and was determined adversely to Appellant by a Court with jurisdiction over the defendant and therefore the power to decide whether it had jurisdiction over the subject matter.

It is Dufief's contention that even if Hynning is correct in now labelling the issue as one of subject matter jurisdiction the doctrine of *res judicata* precludes him from raising that issue on this appeal. This Court held in *Stoll v. Gottlieb*, 305 U.S. 165 (1938), that *res judicata* applied to a Court's determination of its jurisdiction over the subject matter when the issue had been litigated. In *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), the Court went further, holding that explicit litigation of the jurisdictional issue was unnecessary. In *Chicot*, the Court suggests that there need only have been an opportunity to litigate the question. 308 U.S. at 378. This result was upheld in *Jackson v. Irving Trust Co.*, 311 U.S. 494 (1941) where the petitioner had also argued that the jurisdictional point was not contested or adjudicated at the trial. The Court held that whether a particular issue was actually litigated is immaterial in view of the necesary conclusion that there was full opportunity to litigate it; the Court also held that however the issues were labeled the Court was authorized to determine them.

This Court has held that a party is entitled to but one trial and he should have the burden of presenting his entire case at that time. *Grubb v. Public Utilities Commission*, 281 U.S. 470 at 479 (1930). Dufief argues that Hynning,

even if he is correct in saying that subject matter jurisdiction was not explicitly litigated in the first case, had full opportunity to litigate it and it could have or should have been litigated and Hynning is now barred by the doctrine of *res judicata* and collateral estoppel from relitigating the issue. *Chicot County Drainage District v. Baxter State Bank, supra, Jackson v. Irving Trust Co., supra, Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. United States,* 585 F.2d 254 (1978).

In *Stoll v. Gottlieb, supra,* 305 U.S. 171-172, Mr. Justice Reed stated:

> "A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. *There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court.* Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. *Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter."* [Emphasis added.]

Thus a Court, if it obtained the requisite jurisdiction over the defendant, has the power to decide whether it has jurisdiction over the subject matter. *Stoll v. Gottlieb, supra,* 305 U.S. 165. The *Restatement* on Judgments recognizes this:

> "Although the court does not have jurisdiction over the subject matter, it may have jurisdiction

> to determine the question whether it has jurisdiction over the subject matter and to bind the parties by its determination, with the result that thereafter they are precluded from successfully contending that the court had no jurisdiction over the subject matter." *Restatement*, Judgments §10 Comment a (1942).

There is no dispute that the Arlington Court had personal jurisdiction over the partnership. Therefore in rendering its judgment, the Court tacitly, if not expressly, determined that it had jurisdiction over the subject matter and the issue ought not be relitigated. "It is just as important that there should be a place to end [litigation] as there should be a place to begin." *Stoll v. Gottlieb*, 305 U.S. 165 at p. 172 (1938).

3. The judgment below rests on an adequate non-federal basis, *res judicata* and collateral estoppel.

The judgment in the Arlington Circuit Court on March 27, 1979 was based on that Court's finding that Hynning was barred from raising the issue of the validity of the original judgment. The Court found that:

> "A careful reading of the able arguments presented in the prior case indicates that while the issue of subject matter jurisdiction was not phrased in that precise term, the concepts asserted were identical and could not have escaped the attention of the appellate courts. The denial of the appeals in effect confirmed the trial court's determination that it had jurisdiction. It is noted further that the present Complainant is in privity with the Plaintiff in the prior case and it is my judgment that the Defendant is barred in this

action to raise the issue of the validity of the original judgment."

That judgment then rests on a decision that the question in issue is *res judicata* and therefore does not present a federal question. The question of *res judicata* is one of general law and not one that depends upon the Constitution, treaties or statutes of the United States. *The City and County of San Francisco v. Itsell*, 133 U.S. 65 (1890), *Beals v. Cone*, 188 U.S. 184 (1903). The denial of a Writ of Certiorari by the Supreme Court has no value as precedent but that denial does signify that appellate review had been exhausted, that the parties had their day in Court and that the case could be *res judicata* in a subsequent action. *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir. 1967).

4. The Virginia Statute allowing service of process on one partner to give the Court jurisdiction of the partnership is Constitutional under Section I of the Fourteenth Amendment to the Constitution of the United States.

A partnership has been defined in the Uniform Partnership Act as "an association of two or more persons to carry on as co-owners, a business for profit." §50-6, Code of Virginia (1950), as amended.

Even after the adoption of the Uniform Partnership Act, the jurisdictions are divided as to whether a partnership is a legal entity distinct from the persons comprising it. 60 *Am. Jr.*2d. Partnerships, § 322,323. In Virginia it is held that a common law partnership is not a separate entity and thus could not sue or be sued in its firm name. The Virginia Court has further held that the Uniform Partnership Act does not require the naming of the partnership as a defendant in a suit against the partners. *McCormick v.*

Romans, 214 Va. 144, 198 S.E.2d 651 (1973). Indeed, the United States Supreme Court, in the case of *Great Southern Fire Proof Hotel Company v. Jones*, 177 U.S. 499, (1900), held that with regard to jurisdiction of the United States Court based on the diversity of citizenship of the parties, the Court must look to the citizenship of the persons composing a partnership association, even though such association may have some of the characteristics of a corporation.

In an effort to overcome the nebulous character of partnerships, many jurisdictions, including Virginia, have enacted statutes that provide that in actions against members of partnerships, service of process upon one of the partners is service on all and that service of process on one of the partners gives the Court jurisdiction over the partnership. 60 *Am. Jur.*2d, Partnerships, §330.

The Code of Virginia (1950), as amended, § 8-59.1, provides as follows:

> "Process against, or notice to, a copartner or partnership may be served upon a partner and it shall be deemed service upon the partnership and upon each partner individually named in the action, provided the person served is not a plaintiff in the suit, and provided the matter in suit is a partnership matter."

Hynning has conceded that he was a general partner in the partnership and thus, under the Virginia Statute, service upon him sufficed to give Virginia jurisdiction over both Hynning and the partnership, *The Caravel Office Building Company*.

This Court has approved a statute similar to Virginia's in the case of *Sugg v. Thornton*, 132 U.S. 524 (1889), which involved a suit in Texas by Mr. Thornton against

several defendants, including a partnership composed of E.C. Sugg, a resident of Texas, and Iker Sugg, a resident of Wyoming. The Texas Statute stated:

> "Art. 1224. In suits against partners the citation may be served upon one of the firms, and such service shall be sufficient to authorize a judgment against the firm, and against the partner actually served." (Page 526)

E.C. Sugg was served in Texas and Iker Sugg was served in Wyoming under a Texas Statute which allowed constructive service out of state upon a non-resident. The United States Supreme Court upheld the Texas Statute providing for a judgment against the resident partner and the partnership assets only. The *Sugg* case is identical to our present case also in that the non-resident partner appeared and challenged the judgment on the merits and having lost on the merits, the United States Supreme Court held that he could not then contest the proceedings on the grounds that the Court had no jurisdiction over him.

Various state courts have held that service of process on one partnership is sufficient to give the Court jurisdiction over the partnership. *Hibou v. Ramsing,* (Del. Super, 1974) 324 A.2d 777; *Diamond National Corp. v. Thunderbird Hotel, Inc.*, 85 Nev. 271, 454 P.2d 13 (1969); *Fidelity and Casualty Company of New York v. Homan,* (Fla. App. 1959) 116 So.2d 444 and other cases cited at 60 *Am. Jur.*2d, Partnerships, §330.

In *Hibou v. Ramsing, supra,* the Delaware Court held that even though the non-resident partnership did not do any business in Delaware, service upon a resident partner was sufficient to constitute service upon the partnership. *Hibou v. Ramsing,* at p. 782.

In *Fidelity and Casualty Co. of New York v. Homan, supra,* the Florida Court upheld a statute that allowed service upon one partner to be valid service upon the partnership. That statute, as Virginia's, made no distinction as to whether the defendants or their partnership were residents or non-residents. The partnership involved was a Pennsylvania partnership with no contacts in Florida other than the fact that one partner resided in Florida. The partnership obligation was incurred in Pennsylvania. The Court held that service upon the Florida partner was sufficient to give the Court jurisdiction over the partnership. The Court based its decision on the fact that both Florida and Pennsylvania hold that a partnership is not a separate legal entity apart form the individuals who comprise it. *Fidelity, supra,* at p. 447. The law in Virginia is also that a partnership is not a separate legal entity.

It is also interesting to note that the defendant partner in *Fidelity* conceded that the Florida Court had jurisdiction over the subject matter – i.e., that the Court had general jurisdiction over actions for breach of contract. Therefore, the question was basically one of jurisdiction over the person. *Fidelity,* p. 446.

In his appeal Hynning had cited a line of cases running from the landmark decisions of *Pennoyer v. Neff,* 25 U.S. 714 (1878) and *International Shoe Company v. State of Washington,* 326 U.S. 310 (1945) through the recent case of *Shaffer v. Heitner,* 433 U.S. 186 (1977). Dufief has no quarrel with the legal principals enunciated in these cases but contends that Appellant's reliance on them is sorely misplaced when considered in light of our present case. The cases relied upon by Appellant all involved the forum Court attempting to exercise personal jurisdiction over non-resident defendants by means of constructive service outside the forum jurisdiction. In our present case we have actual, valid substituted service on the general partner of

the defendant partnership, who is domiciled in the State of Virginia, and because partnerships are not a separate legal entity apart from the partners, that is sufficient to give the Court jurisdiction over the partnership.

In that case of *Milliken v. Meyer*, 311 U.S. 457, the Supreme Court held that:

> "Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. Substituted service insuch cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state." (Page 462)

See also 62 *Am. Jur.*2d, Process, § 69; 126 ALR 1474. Therefore, it is Dufief's contention that Virginia's Statute on Service of Process is Constitutional.

CONCLUSION

Appellee Dufief respectfully submits that for the reasons set out above, Appellant presents no substantial question for the decision of this Court and therefore, this Honorable Court should dismiss this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the aforesaid document were on this 21st day of August, 1980, mailed, first class postage prepaid to: Frank E. Brown, Jr., Counsel for Appellant, Barham, Radigan, Suiters & Brown, P.C., 2009 North 14th Street, Suite 410, Arlington, Virginia 22216.

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No. 80-32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLIFFORD J. HYNNING,
Appellant,

v.

DUFIEF MORTGAGE, INC., *et. al.*,
Appellees

On Appeal from the Supreme Court of Virginia

REPLY OF CLIFFORD J. HYNNING TO MOTION TO DISMISS

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Appellant, Clifford J. Hynning (hereinafter called the "partner") replies to the Motion to Dismiss by DuFief Mortgage, Inc. (hereinafter called "DuFief"). Bracketed page numbers will refer to the Motion to Dismiss.

1. Issue preclusion is relevant only if the Virginia statute is unconstitutional.

If the partnership statutes or rules of court of approximately half the states, including Virginia, are clearly constitutional, this appeal should be summarily dismissed.

Issue preclusion becomes a hurdle in this appeal only if the partnership statutes are unconstitutional. DuFief has now conceded [pp. 3-5] that the issue in the earlier Petition for Certiorari was *in personam* jurisdiction. DuFief, however, seeks to avoid consideration of the constitutionality of the Virginia statute by asking this Court to establish a precedent that an exercise of state court jurisdiction in violation of due process may be validated through issue preclusion. While the sovereign may confer preliminary jurisdiction to permit a court to determine whether it has jurisdiction, the sovereign does not have the power to permit or sanction the exercise of jurisdiction beyond due process. Just as due process imposes an outer limit on the exercise of state court jurisdiction, it likewise imposes an outer limit on issue preclusion. Consequently, the question of issue preclusion here is a matter of the U.S. Constitution itself and cannot be classified as a non-federal ground of the decision below.

DuFief cites *Stoll* v. *Gottlieb,* 305 U.S. 165, and *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371. *Stoll, Chicot* and *Treinies,* v. *Sunshine Mining Co.,* 308 U.S. 66, indicate that if proceedings in the original action comport with due process many, *not* all, questions of judicial power become less important than preserving the finality of judgments. DuFief fails to cite *Kalb* v. *Feuerstein,* 308 U.S. 433, and *United States* v. *United States Fid. & Guar. Co.,* 309 U.S. 506, unanimous decisions by essentially the same Court. *Kalb* and *Fidelity* both recognize that there are some issues which *are* more important than the finality of judgments.

That these cases must be read together has been recognized by the Restatement of Judgments. DuFief quotes from the 1942 Restatement, Section 10, Comment a [pp. 7, 8], but fails to mention its Comment b lists factors for consideration in denyng the effect of *res judicata.*

Restatement (Second), Judgments has carved major exceptions to the finality of judgments, inter alia, as follows:

> **Section 15. Contesting Subject Matter Jurisdiction.**
>
> **When a court has rendered judgment in a contested action, the judgment precludes the parties from relitigating the question of a court's subject matter jurisdiction in subsequent litigation except if:**
>
> **(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority. . . .**[1]

The jurisdictional statement (at p. 18) applied the "black-letter" to this appeal, together with the following paraphrased and quoted excerpts from comment "d. Subject matter jurisdiction not expressly determined" from Restatement II of Jugdments, T.D. No. 6, pp. 154, 157-58.

In Section 15, Comment d, the Restatement II recognizes that when a belated contention about subject matter jurisdiction has some substantial merit, the adversary system has failed to bring forward a highly relevant issue in the original proceeding and the application of *res judicata* poses a genuine dilemma (pp. 157-58):

---

[1]Restatement (Second) Judgments p. 149 (T.D. No. 6, 1979) p. 149. The tentative drafts were approved at the 1980 meeting of the American Law Institute, for publication, subject to editorial review by the reporter and advisers.

> "The question, therefore, is whether the public interest in observance of the particular jurisdictional rule is sufficiently strong to permit a possibly superflous vindication of the rule by a litigant who is underserving of the accompanying benefit that will redound to him. The public interest is of that strength only *if the tribunal's excess of authority was plain or has seriously disturbed the distribution of governmental powers or has infringed a fundamental constitutional protection.*" [Emphasis added.]

Here, in this appeal, the vindication would not be superfluous, as the question presented affects approximately half the states and involves not only a usurpation of power but also poses serious practical problems in the conduct of business by limited partnerships. Permitting a state court to exercise jurisdiction beyond the limits imposed by federal due process seriously disturbs the distribution of governmental powers among the states and infringes upon a fundamental constitutional protection of persons and property. This is particularly true in states such as Virginia where there is no appeal of right from a trial court's decision, and its ruling in favor of its own jurisdiction may be allowed to stand merely by denial of a Petition for Writ of Error without full argument or any kind of appellate opinion. Restatement II has recognized that one policy underlying the strength of the doctrine of *res judicata* is that, "there is virtually always available a procedure by which to obtain review of the original tribunal's determination of the issue [of subject matter jurisdiction], either by appeal or by injunction or extraordinary writ." Restatement (Second), Judgments, Sec. 15, Comment c (T.D. No. 6, 1979), p. 154.

Neither *Stoll* nor *Chicot,* supra at p. 2, held that an exercise of jurisdiction in violation of due process can be

validated by issue preclusion when such exercise was a manifest abuse of authority.

2. The cases cited by DuFief do not hold that a state may exercise jurisdiction over a non-resident partnership merely because a general partner resides in the forum state.

DuFief places great reliance on *Sugg* v. *Thornton,* 132 U.S. 524, and *Fidelity & Cas. Co. of New York* v. *Homan,* 116 So.2d 444 (Fla D.Ct.App. 1959). *Sugg* was a suit in Texas against a Texas partnership, with process served on a non-resident partner by "certified" mail. The Texas court seized and sold partnership assets in Texas but entered no judgment against the non-resident partners individually. The only question decided by this Court was one of fact —whether the evidence supported a finding that the partnership note was signed with authority of the partnership.

In *Homan,* the lower court held, consistent with the partner's contention here, that there was no jurisdiction over the subject matter; on appeal, the issue of subject matter jurisdiction was conceded by the parties. However, in holding that the court below should exercise jurisdiction under the averments in the complaint, the appellate court made it clear that it was not precluding the appellee from asserting defensive pleadings which would justify the lower court in refusing the exercise jurisdiction.

Cited cases involving the method of service of process are inapposite. The Virginia statute provides an acceptable method of service of process — it does not provide a constitutional basis upon which to predicate jurisdiction.

Although DuFief stresses the fact that the partner was a resident of Virginia, the Virginia statute requires only two inquiries: (a) whether the subject matter of the suit is a "partnership matter", and (b) whether the individual serv-

ed in Virginia is a general partner. Thus, under the Virginia statute, a court could exercise subject matter jurisdiction over a non-resident partnership having no contacts with Virginia by service on a non-resident general partner who happened to be present in Virginia at the time of service.

3. By emphasizing that a partnership is not a juridical entity, DuFief underscores the partner's contention that the questions presented are substantial and require resolution by this Court.

DuFief has conceded that the non-resident partnership conducted no business whatever in Virginia [p. 2]. DuFief's emphasis on the fact that a partnership is not a juridical entity like a corporation [pp. 9, 10], demonstrates that the questions presented are substantial both from a constitutional standpoint and from the point of view of the chaotic state of partnership law which the result urged by DuFief would create.

Prior to 1976, the Uniform Limited Partnership Act had no provision for the recognition of a foreign limited partnership in another state, and most states had no provisions for permitting the filing of the certificate of a foreign limited partnership. In fact some jurisdictions, such as the District of Columbia, specifically refuse to record certificates of foreign limited partnerships.[2]

Since a limited partnership is solely a creature of statute, it can have no legal existence beyond the limits of the jurisdiction where it is created unless the partnership is recognized by the foreign jurisdiction through satisfaction of that state's statutes and regulations. In short, a limited partnership, as an entity, cannot cross state lines. If a limited partnership formed in one state attempted to do

[2]"Foreign Limited Partnership: A proposed Amendment to the Uniform Limited Partnership Act," 47 S.Cal.L.Rev. 1174, 1189 (1974).

business in another, a new partnership would be formed by common law. Not having "substantially complied" with the foreign jurisdiction's statutory requirements for formation of a limited partnership, it could only be regarded as a common law general partnership, subjecting all partners, including limited partners, to unlimited liability. At best, even if the foreign partnership were recognized as a limited partnership, it would be a different limited partnership from the one in the state of its creation, and limited partners would be subjected to additional liability in the second state for the amount of their capital contributions.

This situation engendered "confusion and conflict beyond imagination,"[3] with endless complications for full and accurate disclosure of investment potential and investment liability under federal and state securities laws. If a limited partnership did business in more than one state, it was impossible to represent to potential limited partners that liability would be limited to the amount of their original contribution. It was partially in response to these problems that the 1976 amendments to the ULPA were promulgated.

The foregoing problems exist in cases where the limited partnership *is* transacting business in a foreign jurisdiction and attempting to comply with the requirements of that jurisdiction and as they relate to limited partnerships. In asking this Court to sustain the constitutionality of a partnership statute by holding that a partnership is automatically made a domiciliary of each state in which a general partner happens to reside [p. 13], DuFief seeks a result which would compound the already serious problems by extending them to states in which the partnership transacts no business or affairs and by subjecting limited partners to unlimited liability in those states.

[3]Kratovil & Werner, "Fixing up the Old Jalopy The Modern Limited Partnership under the ULPA," 50 St. John's L.Rev. 51, 67 (1975).

DuFief's citation [p. 10] of *Gt. So. Fireproof Hotel Co.*, 111 U.S. 499, a federal court diversity case on partnerships has only the narrow significance of limiting the diversity jurisdiction of Federal courts and is not a precedent to validate state court jurisdiction in partnership matters beyond the minimum contacts standard of due process. The legal fictin in diversity cases that a partnership is domiciled in every state in which a general partner resides makes it more difficult for a partnership to satisfy the test of the complete diversity of parties. The practical result is that much partnership litigation is confined to state courts. But state courts, as well as Federal courts satisfying the complete diversity test, must justify their jurisdiction by the constitutional standard of due process – the minimum contacts requirement of International Shoe and its progency.

DuFief [p. 12] "has no quarrel with the legal principals [sic] enunciated" in *International Shoe Co.* v. *Washington,* 326 U.S. 310 through *Shaffer* v. *Heitner,* 433 U.S. 186, "but contends that Appellant's reliance on them is sorely misplaced . . ." DuFief is silent on this year's decision in *Rush* v. *Savchuck,* 444 U.S. ____, 100 S. Ct. 571, on which the Jurisdictional Statement greatly relies at pp. 20-21. *Rush* is believed controlling on this appeal.

CONCLUSION

The Attorney General of Virginia has stated: "Having reviewed the Jurisdictional Statement, I do not deem it necessary for the Commonwealth to formally oppose jurisdiction" [Letter to the Honorable Michael Rodak, Jr., July 25, 1980]. Only DuFief seeks to persuade this Court to establish a precedent by declining to subject the Virginia statute to constitutional scrutiny.

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